19-3204-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York; MAZARS USA, LLP,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York, No. 19-cv-8694 (Marrero, J.)

JOINT APPENDIX

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TABLE OF CONTENTS

CLOSED,APPEAL,ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:19−cv−08694−VM

Trump v. Vance, Jr. et al
Assigned to: Judge Victor Marrero
Case in other court: U.S.C.A. − 2nd Circ., 19−03204
Cause: 28:1331 Fed. Question

Date Filed: 09/19/2019
Date Terminated: 10/07/2019
Jury Demand: None
Nature of Suit: 950 Constitutional − State Statute
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
09/19/2019	1	COMPLAINT against Mazars USA, LLP, Cyrus R. Vance, Jr.. (Filing Fee $ 400.00, Receipt Number 465401244444)Document filed by Donald J. Trump.(pc) (jgo). (Entered: 09/19/2019)
09/19/2019	2	CIVIL COVER SHEET filed. (pc) (jgo). (Entered: 09/19/2019)
09/19/2019		Magistrate Judge Katharine H. Parker is so designated. Pursuant to 28 U.S.C. Section 636(c) and Fed. R. Civ. P. 73(b)(1) parties are notified that they may consent to proceed before a United States Magistrate Judge. Parties who wish to consent may access the necessary form at the following link: http://nysd.uscourts.gov/forms.php. (pc) (Entered: 09/19/2019)
09/19/2019		Case Designated ECF. (pc) (Entered: 09/19/2019)
09/19/2019	3	MOTION for William S. Consovoy to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number ANYSDC−17626124. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Donald J. Trump. (Attachments: # 1 Affidavit, # 2 Exhibit Certificate of Good Standing (VA), # 3 Exhibit Certificate of Good Standing (DC), # 4 Text of Proposed Order)(Consovoy, William) (Entered: 09/19/2019)
09/19/2019		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 3 MOTION for William S. Consovoy to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number ANYSDC−17626124. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb)** (Entered: 09/19/2019)
09/19/2019	4	ENDORSED LETTER addressed to Judge Victor Marrero from Christopher Conroy dated [undated] re: the parties have agreed to the following schedule subject to the Court's approval. ENDORSEMENT: Request GRANTED. The briefing schedule and hearing on the motion for injunctive relief in this action shall be as set forth above.

		(Mazars USA, LLP answer due 9/23/2019; Cyrus R. Vance, Jr. answer due 9/23/2019.) (Signed by Judge Victor Marrero on 9/19/2019) (jwh) (Entered: 09/19/2019)
09/19/2019		Set/Reset Hearings: Oral Argument set for 9/25/2019 at 09:30 AM before Judge Victor Marrero. (jwh) (Entered: 09/19/2019)
09/20/2019	5	ORDER FOR ADMISSION PRO HAC VICE granting 3 Motion for William S. Consovoy to Appear Pro Hac Vice. (As further set forth in this Order.) (Signed by Judge Victor Marrero on 9/20/2019) (cf) (Entered: 09/20/2019)
09/20/2019	6	MOTION for Preliminary Injunction . Document filed by Donald J. Trump. Return Date set for 9/25/2019 at 09:30 AM. (Attachments: # 1 Text of Proposed Order, # 2 Affidavit, # 3 Memo of Law)(Futerfas, Alan) (Entered: 09/20/2019)
09/20/2019	7	NOTICE OF APPEARANCE by Solomon B Shinerock on behalf of Cyrus R. Vance, Jr.. (Shinerock, Solomon) (Entered: 09/20/2019)
09/20/2019	8	ORDER: It is hereby ordered that the oral argument scheduled for September 25, 2019 at 9:30 a.m. shall be held in Courtroom 23B of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007. (Oral Argument set for 9/25/2019 at 09:30 AM in Courtroom 23B, 500 Pearl Street, New York, NY 10007 before Judge Victor Marrero.) (Signed by Judge Victor Marrero on 9/20/2019) (cf) (Entered: 09/20/2019)
09/20/2019	9	NOTICE OF APPEARANCE by Allen James Vickey on behalf of Cyrus R. Vance, Jr.. (Vickey, Allen) (Entered: 09/20/2019)
09/20/2019	10	AMENDED MEMORANDUM OF LAW in Support re: 6 MOTION for Preliminary Injunction . . Document filed by Donald J. Trump. (Attachments: # 1 Amended Memorandum of Law)(Consovoy, William) (Entered: 09/20/2019)
09/23/2019	11	NOTICE OF APPEARANCE by James Henry Graham on behalf of Cyrus R. Vance, Jr.. (Graham, James) (Entered: 09/23/2019)
09/23/2019	12	MOTION for Christopher Raymond Conroy to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number ANYSDC−17643369. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Cyrus R. Vance, Jr..(Conroy, Christopher) (Entered: 09/23/2019)
09/23/2019		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 12 MOTION for Christopher Raymond Conroy to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number ANYSDC−17643369. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb)** (Entered: 09/23/2019)
09/23/2019	13	NOTICE OF APPEARANCE by Carey R. Dunne on behalf of Cyrus R. Vance, Jr.. (Dunne, Carey) (Entered: 09/23/2019)
09/23/2019	14	ORDER FOR ADMISSION PRO HAC VICE granting 12 Motion for Christopher Raymond Conroy to Appear Pro Hac Vice. (Signed by Judge Victor Marrero on 9/23/2019) (mro) (Entered: 09/23/2019)
09/23/2019	15	LETTER addressed to Judge Victor Marrero from Vance dated 2019.09.23 re: 19 Civ. 8694. Document filed by Cyrus R. Vance, Jr..(Shinerock, Solomon) (Entered: 09/23/2019)
09/23/2019	16	MEMORANDUM OF LAW in Opposition re: 6 MOTION for Preliminary Injunction . . Document filed by Cyrus R. Vance, Jr.. (Shinerock, Solomon) (Entered: 09/23/2019)
09/23/2019	17	DECLARATION of Solomon B. Shinerock in Opposition re: 6 MOTION for Preliminary Injunction .. Document filed by Cyrus R. Vance, Jr.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4)(Shinerock, Solomon) (Entered: 09/23/2019)
09/24/2019	18	NOTICE OF APPEARANCE by Jerry D. Bernstein on behalf of Mazars USA, LLP. (Bernstein, Jerry) (Entered: 09/24/2019)
09/24/2019	19	NOTICE OF APPEARANCE by Inbal Paz Garrity on behalf of Mazars USA, LLP. (Garrity, Inbal) (Entered: 09/24/2019)

09/24/2019	20	NOTICE OF APPEARANCE by Nicholas Robert Tambone on behalf of Mazars USA, LLP. (Tambone, Nicholas) (Entered: 09/24/2019)
09/24/2019	21	**FILING ERROR − PDF ERROR −** AMENDED COMPLAINT amending 1 Complaint against Mazars USA, LLP, Cyrus R. Vance, Jr..Document filed by Donald J. Trump. Related document: 1 Complaint.(Consovoy, William) Modified on 9/25/2019 (jgo). (Entered: 09/24/2019)
09/24/2019	22	REPLY MEMORANDUM OF LAW in Support re: 6 MOTION for Preliminary Injunction . . Document filed by Donald J. Trump. (Consovoy, William) (Entered: 09/24/2019)
09/24/2019	23	NOTICE OF APPEARANCE by Jeffrey Stuart Oestericher on behalf of UNITED STATES OF AMERICA. (Oestericher, Jeffrey) (Entered: 09/24/2019)
09/24/2019	24	RESPONSE to Motion re: 6 MOTION for Preliminary Injunction . *Statement of the United States*. Document filed by UNITED STATES OF AMERICA. (Oestericher, Jeffrey) (Entered: 09/24/2019)
09/25/2019	25	ORDER. It is hereby ORDERED that the stay of enforcement of and compliance with the subpoena issued to Mazars USA, LLP, which is scheduled to expire today, September 25, 2019 at 1:00 p.m. (see Dkt. No. 4), shall be extended to tomorrow, September 26, 2019 at 5:00 p.m. It is further ORDERED that the parties in this action shall meet and confer regarding their respective concerns, and inform the Court, through the submission of a joint letter by tomorrow, September 26, 2019 at 4:00 p.m., whether they have agreed upon a process for proceeding in the interim period between expiration of the current stay and the issuance of the Court's decision. Finally, it is ORDERED that the request of the United States (Dkt. No. 24) for additional time to determine whether to participate in this action is GRANTED. The United States shall have until close of business on Monday, September 30, 2019, to inform the Court and the parties whether it intends to participate in this action. If the United States determines that it will participate, it shall have until close of business on Wednesday, October 2, 2019, to file a submission. SO ORDERED. (Signed by Judge Victor Marrero on 9/25/19) (yv) (Entered: 09/25/2019)
09/25/2019	26	ENDORSED LETTER addressed to Judge Victor Marrero from Jerry D. Bernstein dated 9/24/19 re: advising the Court of Mazars USA's position as to Plaintiff's motion for a temporary restraining order and a preliminary injunction. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by Defendant Mazars USA. (Signed by Judge Victor Marrero on 9/25/19) (yv) (Entered: 09/25/2019)
09/25/2019		*****NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney William Consovoy to RE−FILE Document No. 21 Amended Complaint. The filing is deficient for the following reason(s): the PDF attached to the docket entry for the pleading is not correct. The PDF must be titled to correspond with the event type being used. Re−file the pleading using the event type Amended Complaint found under the event list Complaints and Other Initiating Documents − attach the correct signed PDF − select the individually named filer/filers − select the individually named party/parties the pleading is against. (jgo)** (Entered: 09/25/2019)
09/25/2019	27	AMENDED COMPLAINT amending 1 Complaint against Mazars USA, LLP, Cyrus R. Vance, Jr..Document filed by Donald J. Trump. Related document: 1 Complaint.(Consovoy, William) (Entered: 09/25/2019)
09/25/2019		Minute Entry for proceedings held before Judge Victor Marrero: Oral Argument held on 9/25/2019. William Consovoy, Marc Mukasey, Alan Futerfas, and Cameron Norris present for the plaintiff, President Donald J. Trump. Carey Dunne, Solomon Shinerock, Christopher Conroy, Allen Vickey, and James Graham present for defendant Cyrus R. Vance, Jr., in his official as District Attorney of the County of New York. Inbal Paz Garrity, Jerry Bernstein, Nicholas Tambone, and Michael Mullman present for defendant Mazars USA, LLP. Court reporter present. The Court heard oral arguments from the parties. (al) (Entered: 09/25/2019)
09/26/2019	28	ENDORSED LETTER addressed to Judge Victor Marrero from Carey R. Dunne, William Consovoy, Jerry D. Bernstein dated 9/26/2019 re: Pursuant to the Court's order of September 25, 2019 (Dkt. #25), and without prejudice to any right asserted by

		any party, we write to inform the Court that the parties have reached a temporary arrangement, and as further specified in this letter. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the parties. So ordered. (Signed by Judge Victor Marrero on 9/26/2019) (rjm) (Entered: 09/26/2019)
09/30/2019	29	SEALED DOCUMENT placed in vault.(rz) (Entered: 09/30/2019)
10/01/2019	30	ENDORSED LETTER addressed to Judge Victor Marrero from Geoffrey S. Berman dated 9/30/2019 re: In accordance with the Court's order of September 25, 2019 (ECF No. 25), we write respectfully to inform the Court that the United States of America will file a submission by the close of business on Wednesday, October 2, 2019. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Government. (Signed by Judge Victor Marrero on 9/30/2019) (js) (Entered: 10/01/2019)
10/02/2019	31	NOTICE OF APPEARANCE by Joshua E. Gardner on behalf of UNITED STATES OF AMERICA. (Gardner, Joshua) (Entered: 10/02/2019)
10/02/2019	32	RESPONSE to Motion re: 6 MOTION for Preliminary Injunction . *Statement of Interest*. Document filed by UNITED STATES OF AMERICA. (Gardner, Joshua) (Entered: 10/02/2019)
10/03/2019	33	ENDORSED LETTER addressed to Judge Victor Marrero from Carey R. Dunne, Christopher Conroy, Solomon B. Shinerock, James H. Graham and Allen Vickey dated 10/3/2019 re: We write to respond briefly to the "Statement of Interest" filed by the United States Department of Justice ("DOJ") in this litigation late yesterday afternoon. We reiterate our position that this matter should be dismissed pursuant to the settled law mandating abstention. Further, for all the reasons articulated in our brief (Dkt. 16: at 11−19), Plaintiff's motion for injunctive relief should be denied, including on the ultimate merits, which turn on the law and have been, at this point, fully briefed and argued. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by defendant. So Ordered. (Signed by Judge Victor Marrero on 10/3/2019) CC: all counsel of record (via email)(js) (Entered: 10/03/2019)
10/04/2019	34	ENDORSED LETTER addressed to Judge Victor Marrero from William S. Consovoy dated 10/4/2019 re: President's pending motion. ENDORSEMENT: With the filing of the letter above in the public docket of this action, the Court has closed the record of this proceeding. The parties are directed to refrain from mailing any further submissions. Any other papers filed will not be endorsed. (Signed by Judge Victor Marrero on 10/4/2019) (jwh) (Entered: 10/04/2019)
10/07/2019	35	DECISION AND ORDER: For the reasons described above, it is hereby ORDERED that the amended complaint of plaintiff Donald J. Trump (Dkt. No. 27) is DISMISSED pursuant to the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37 (1971). (Signed by Judge Victor Marrero on 10/7/2019) (tro) (Entered: 10/07/2019)
10/07/2019	36	**FILING ERROR − NO ORDER SELECTED FOR APPEAL −** EMERGENCY NOTICE OF APPEAL. Document filed by Donald J. Trump. Filing fee $ 505.00, receipt number ANYSDC−17724879. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Consovoy, William) Modified on 10/7/2019 (tp). (Entered: 10/07/2019)
10/07/2019		*****NOTICE TO ATTORNEY REGARDING DEFICIENT APPEAL. Notice to attorney Consovoy, William to RE−FILE Document No. 36 Notice of Appeal. The filing is deficient for the following reason(s): the order/judgment being appealed was not selected. Re−file the appeal using the event type *Corrected Notice of Appeal* found under the event list Appeal Documents − attach the correct signed PDF − select the correct named filer/filers − select the correct order/judgment being appealed. (tp)** (Entered: 10/07/2019)
10/07/2019	37	EMERGENCY CORRECTED NOTICE OF APPEAL re: 36 Notice of Appeal, 35 Order,. Document filed by Donald J. Trump. (Consovoy, William) (Entered: 10/07/2019)

10/07/2019		Appeal Fee Paid electronically via Pay.gov: for 37 Corrected Notice of Appeal. Filing fee $ 505.00. Pay.gov receipt number ANYSDC−17724879, paid on 10/07/2019. (nd) (Entered: 10/07/2019)
10/07/2019		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 37 Corrected Notice of Appeal. (nd) (Entered: 10/07/2019)
10/07/2019		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 37 Emergency Corrected Notice of Appeal filed by Donald J. Trump were transmitted to the U.S. Court of Appeals. (nd) (Entered: 10/07/2019)
10/07/2019		USCA Case Number 19−3204 from the U.S.C.A. − 2nd Circ. assigned to 37 Emergency Corrected Notice of Appeal filed by Donald J. Trump. (nd) (Entered: 10/07/2019)
10/07/2019	38	TRANSCRIPT of Proceedings re: HEARING held on 9/25/2019 before Judge Victor Marrero. Court Reporter/Transcriber: Karen Gorlaski, (212) 805−0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/28/2019. Redacted Transcript Deadline set for 11/7/2019. Release of Transcript Restriction set for 1/5/2020.(McGuirk, Kelly) (Entered: 10/07/2019)
10/07/2019	39	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a HEARING proceeding held on 9/25/19 has been filed by the court reporter/transcriber in the above−captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 10/07/2019)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,
Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York;

and

MAZARS USA, LLP,
Defendants.

Case No. 1:19-cv-8694-VM

AMENDED COMPLAINT

Plaintiff Donald J. Trump brings this complaint against Defendants for violations of the U.S. Constitution and alleges as follows:

INTRODUCTION

1. Virtually "all legal commenters agree" that a sitting President of the United States is not "subject to the criminal process" while he is in office. Memorandum for the U.S. Concerning the Vice President's Claim of Constitutional Immunity 17, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965 (D. Md.) (Bork Memo). "[N]o county prosecutor is allowed to 'arrest[] all the [executive powers] of the government and prostrate[] it at the foot of the states.'" Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2-SPG NEXUS: J. Opinion 11, 14 (1997) (quoting *M'Culloch* v. *Maryland*, 17 U.S. 316, 432 (1819)).

2. Yet a county prosecutor in New York, for what appears to be the first time in our nation's history, is attempting to do just that. The District Attorney of New York County has launched a criminal investigation of the President. As part of his investigation, the District Attorney issued a grand jury subpoena to the President's business for records concerning the President. Unsatisfied with that subpoena, the District Attorney issued another subpoena to the President's accountant that

specifically names the President and requests his personal records—including, among other private documents, his federal tax returns.

3. The Framers of our Constitution understood that state and local prosecutors would be tempted to criminally investigate the President to advance their own careers and to advance their political agendas. And they likewise understood that having to defend against these actions would distract the President from his constitutional duties. That is why the Framers eliminated this possibility and assigned the task to supermajorities of Congress acting with the imprimatur of the nation as a whole, *see* U.S. Const., Art. II, §4, Art. I, §§2-3, rather than "unaccountable state official[s]." Amar & Kalt 20.

4. Because the Mazars subpoena attempts to criminally investigate a sitting President, it is unconstitutional. This Court should declare it invalid and enjoin its enforcement until the President is no longer in office.

PARTIES

5. Plaintiff Donald J. Trump is the 45th President of the United States. He is the grantor and beneficiary of The Donald J. Trump Revocable Trust ("the Trust"). The Trust is the sole ultimate owner of The Trump Organization, Inc.; Trump Organization LLC; The Trump Corporation; DJT Holdings LLC; DJT Holdings Managing Member LLC; Trump Acquisition, LLC; Trump Acquisition Corp. The Trust is the majority ultimate owner of the Trump Old Post Office LLC.

6. Defendant Cyrus R. Vance, Jr., is the District Attorney for the County of New York. The subpoena to Mazars was issued by his office and under his authority. Vance is sued in his official capacity.

7. Defendant Mazars USA LLP is a New York accounting firm and the recipient of the subpoena. It is sued in its capacity as custodian of the President's records and is a defendant to ensure that the President can obtain effective relief.

JURISDICTION & VENUE

8. The Court has subject-matter jurisdiction because this case arises under the Constitution and laws of the United States. 28 U.S.C. §§1331, 2201. And because the President brings this suit to vindicate the deprivation of "rights, privileges, or immunities secured by the Constitution," 42 U.S.C. §1983, this Court also has jurisdiction under 28 U.S.C. §1343.

9. Venue is proper because Defendants reside in this district and because a substantial part of the events or omissions giving rise to the President's claim occurred in this district. 28 U.S.C. §1391(b).

BACKGROUND

I. The Constitutional Prohibition on Criminal Prosecutions of a Sitting President

10. Though no court has had to squarely consider the question, the U.S. Department of Justice and "[a]lmost all legal commenters agree" that the President cannot be "subject to the criminal process" while in office. Bork Memo 17. This principle stems from Article II, the Supremacy Clause, and the overall structure of the Constitution.

11. Article II vests "[t]he executive Power" in one "President of the United States of America." §1. The President thus "occupies a unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); he "is the only person who is also a branch of government," Jay S. Bybee, *Who Executes the Executioner?*, 2-SPG NEXUS: J. Opinion 53, 60 (1997). Because "the President is a unitary executive," "[w]hen the President is being prosecuted, the presidency itself is being prosecuted." Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2-SPG NEXUS: J. Opinion 11, 12 (1997).

12. Article II also gives the President immense authority over foreign and domestic affairs. He must, among other things, command the armed forces, negotiate treaties and receive ambassadors, appoint and remove federal officers, and "take Care that the Laws be faithfully executed." §§2-3. The President is "the chief constitutional officer of the Executive Branch, entrusted with supervisory and

policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*, 457 U.S. at 750. "Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 713 (1995).

13. "'[N]ecessarily implied'" from the grant of these duties is "'the power to perform them.'" *Fitzgerald*, 457 U.S. at 749 (quoting 3 J. Story, *Commentaries on the Constitution of the United States* §1563). "'The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of his office.'" *Id.* Nor can he be investigated, indicted, or otherwise subjected to criminal process. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222, 246-60 (Oct. 16, 2000); *accord* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2009) ("Even the lesser burdens of a criminal investigation—including preparing for questioning by criminal investigators—are time-consuming and distracting.… [C]riminal investigations take the President's focus away from his or her responsibilities to the people. And a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President."); *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (explaining that "*all* aspects of criminal prosecution of a President must follow impeachment" and that "removal from office must precede *any* form of criminal process against an incumbent President" (emphases added)).

14. Notably, the Framers' debates at the Philadelphia Convention "strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process." Bork Memo 6. They understood "that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate." *Id.* at

17. Oliver Ellsworth and John Adams, for example, stated that "'the President, personally, was not the subject to any process whatever…. For [that] would … put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'" *Fitzgerald*, 457 U.S. at 750 n.31. Later, Thomas Jefferson opined that the Constitution would not tolerate the President being "'subject to the commands of the [judiciary], & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west,'" they could "'withdraw him entirely from his constitutional duties.'" *Id.*

15. While the Supreme Court has held that a private litigant can sue the President in federal court for his unofficial conduct, *Clinton v. Jones*, 520 U.S. 681 (1997), criminal process comes with a "distinctive and serious stigma" that "imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action"—burdens that would intolerably "threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." 24 O.L.C. Op. at 249. "A civil complaint filed by a private person is understood as reflecting one person's allegations," while the "stigma and opprobrium associated with a criminal charge" is "a public rather than private allegation of wrongdoing" that would "undermin[e] the President's leadership and efficacy both here and abroad." 24 O.L.C. Op. at 250-51. The "burdens of responding" to criminal proceedings, moreover, "are different in kind and far greater than those of responding to civil litigation," given their intensely personal nature, their "unique mental and physical burdens" on the suspect, and the "substantial preparation" they demand. *Id.* at 251-54.

16. In short, "[t]o wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." Memorandum from Robert G. Dixon, Jr., Asst. Att'y Gen., O.L.C., *Re: Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office* 30 (Sept. 24, 1973) (Dixon Memo). The President thus cannot be subject to criminal process, for any conduct of any kind, while he is serving as President.

17. Other provisions of the Constitution bolster this conclusion. Beyond creating a unitary executive and granting him immense powers and responsibilities, Article II also states that the President "shall hold his Office during the Term of four Years" and contemplates his "remov[al]" only via "Impeachment." §§1, 4. Removal by impeachment, in turn, requires conviction by two-thirds of the Senate. Art. I, §3. Indeed, the Constitution states that a President "convicted" by the Senate can then be "liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." *Id.* The use of the past-tense "convicted" reinforces that the President cannot be subject to criminal process *before* that point. *See* Bybee 54-65. Prominent Founders agreed. *See, e.g.*, Federalist No. 69, at 416 (Alexander Hamilton) (Rossiter ed., 1961) ("The President … would be liable to be impeached, tried, and, upon conviction … would *afterwards* be liable to prosecution and punishment in the ordinary course of law." (emphasis added)); 2 Farrand, *Records of the Federal Convention* 500 (rev. ed. 1966) (Gouverneur Morris: "A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President *after* the trial of the impeachment." (emphasis added)); Federalist No. 77 at 464 (Alexander Hamilton) (discussing impeachment and "*subsequent* prosecution in the common course of law" (emphasis added)).

18. Any other rule is untenable. It would allow a single prosecutor to circumvent the Constitution's specific rules for impeachment. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838); 24 O.L.C. Op. at 246. The Constitution's assignment of the impeachment power to Congress and its supermajority requirement for removal ensure that "the process may be initiated and maintained only by politically accountable legislative officials" who represent a majority of the entire nation. 24 O.L.C. Op. at 246; *see also* Dixon Memo 32 ("[T]he presidential election is the only national election, and there is no effective substitute for it…. The decision to terminate [the President's nationwide electoral] mandate, therefore, is more fittingly handled by the Congress than by a jury"); Amar & Kalt 12 ("The President is elected by the entire polity and represents all 260 million citizens of the United States of

America. If the President were prosecuted, the steward of *all* the People would be hijacked from his duties by an official of *few* (or none) of them."); Amar & Katyal 713.

19. The constitutional prohibition on subjecting a sitting President to criminal process is even stronger when applied to state and local governments.

20. "Because the Supremacy Clause makes federal law 'the supreme Law of the Land,' Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, §3," raises serious constitutional concerns even in civil cases. *Jones*, 520 U.S. at 691 (citing *Hancock v. Train*, 426 U.S. 167, 178-79 (1976); and *Mayo v. United States*, 319 U.S. 441, 445 (1943)). But in criminal cases, where the State is not acting as a mere forum for private litigation but is *itself* interfering with the President's duties, investigating the President plainly violates the Supremacy Clause.

21. Under the Supremacy Clause, States cannot "defeat the legitimate operations" of the federal government. *M'Culloch*, 17 U.S. at 427. "It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *Id.* Because the President is the solitary head of the executive branch, subjecting him to criminal process would "arrest[] all the [executive powers] of the government, and … prostrat[e] it at the foot of the states." *Id.* at 432; *see* Amar & Kalt 13-16.

22. The threat that state criminal process poses to a President cannot be overstated. He is an "easily identifiable target," and "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 752-53. State and local prosecutors have massive incentives to criminally investigate the President to advance their careers or to damage a political opponent. And given the heavy burdens associated with criminal process, "all you need is one prosecutor, one trial judge, the barest amount of probable cause, and a supportive

local constituency, and you can shut down a presidency." Jed Shugerman, *A Sitting President Generally Can't Be Indicted*, ShugerBlog (May 22, 2018), bit.ly/2kCYb0w.

23. The prohibition on criminally prosecuting a sitting President cannot be circumvented by limiting the investigation to a grand-jury subpoena, or by not subpoenaing the President directly. Any state criminal process that seeks "a finding that it is probable that the President has committed a crime"—even if "obliquely"—would "vitiate the sound judgment of the Framers that a President must possess the continuous and undiminished capacity to fulfill his constitutional obligations." *Sirica*, 487 F.2d at 758 (MacKinnon, J., concurring in part and dissenting in part).

24. For all of these reasons, the Constitution prohibits States from subjecting the President to criminal process while he is in office. The notion that this prohibition "places the President 'above the law'" is "wholly unjustified." *Fitzgerald*, 457 U.S. at 758 n.41. "It is simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Id.* Again, "[a] sitting President who engages in criminal behavior falling into the category of 'high Crimes and Misdemeanors' always subject to removal from office upon impeachment by the House and conviction by the Senate, and is thereafter subject to criminal prosecution." 24 O.L.C. Op. 257; *see also* Bybee 63 ("[T]hat the President is not above the law … is a red herring.… [The relevant constitutional] clauses do not give the President immunity from prosecution; rather, they specify an order in which things are to occur."). We of course have "a government of laws, not men," but "the People have a right to vigorous Executive who protects and defends them, their country, and their Constitution. Temporary immunity is the only way to ensure both of these things." Amar & Kalt 20-21.

II. The Campaign of Bad-Faith Investigations and Harassment of the President

25. Throughout President Trump's time in office, government institutions, both federal and state, controlled by or aligned with the Democratic Party have attempted to use their power to obtain and expose his confidential financial information in order to harass him, intimidate him, and prevent his reelection.

26. After the 2018 midterm elections, Democrats won a majority of seats in the U.S. House of Representatives. They now control every House committee.

27. The "focus" of the new House, according to the incoming Majority Leader, would be examining "the President in terms of what [business] interests he has." As Chairwoman Maxine Waters declared: "We're going to find out where [the President's] money has come from."

28. House Democrats are executing this plan in earnest. Numerous House committees have issued a flurry of subpoenas and requests for information about the President's personal finances and businesses.

29. The House Ways and Means Committee, for example, is currently pursuing the President's federal tax returns.

30. In May 2019, Chairman Richard Neal subpoenaed the IRS for several years' worth of tax returns regarding President Trump and eight Trump entities. He justified his request in terms of "the Federal tax laws"—specifically, determining "the extent to which the IRS audits and enforces the Federal tax laws against a President."

31. Chairman Neal's rationale was pretextual. While House Democrats had offered countless justifications for obtaining the President's tax returns, no one had ever mentioned a desire to find out how the IRS audits Presidents. The Chairman's request, moreover, bore little resemblance to an effort to investigate how the IRS audits Presidents. It asked for the information of only one President, asked for open files for which audits have not been completed, and never asked the IRS for the most relevant information—namely, how it audits Presidents.

32. The Treasury Department did not comply with the Committee's request for the President's federal tax returns. After compiling and reviewing over 40 pages of Democrats' public statements, Secretary Steven Mnuchin concluded that the Committee's request was a partisan effort to expose the President's private tax information. The Department of Justice agreed. *See Congressional*

Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. __, __ (June 13, 2019) (slip op. 26).

33. The House Oversight Committee, for its part, is pursuing several other aspects of the President's finances.

34. In April 2019, Chairman Elijah Cummings subpoenaed Mazars—the longtime accountant for the President and his businesses—for eight years' worth of financial information about the President and several of his businesses. Though his rationales changed over time, Chairman Cummings claims that the subpoena to Mazars would help the Oversight Committee "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office, to determine whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions, to assess whether he is complying with the Emoluments Clauses of the Constitution, and to review whether he has accurately reported his finances to the Office of Government Ethics and other federal entities."

35. Chairman Cummings' subpoena to Mazars, Ranking Member Jim Jordan observed, "is an unpreceded abuse of the Committee's subpoena authority to target and expose the private financial information of the President of the United States" for "political gain." It is an impermissible attempt to "expose the private affairs of individuals," as "Chairman Cummings has cited no specific law or legislative proposal for which he requires eight years of sensitive, personal financial information about President Trump." The subpoena, the Ranking Member added, "is an act of raw partisan politics meant only to further your obsession with attacking the President of the United States." Chairman Cummings "did not dispute the fact that [his] subpoena to Mazars is part of a coordinated and carefully managed campaign to use congressional oversight for political gain," and he never "articulated how the sensitive, personal financial information [he] seek[s] will advance a legitimate legislative purpose."

36. The Department of Justice agreed that there was "strong reason to doubt that the subpoena's real object was legitimate." U.S. Amicus Br. 17, *Trump v. Mazars USA, LLP*, No. 19-5142

(D.C. Cir.) (cleaned up). "If, for example, the central purpose of the Committee's investigation were to aid the House in drafting legislation aimed at more 'accurate reporting of the President's finances,' it is not apparent why detailed information about the President's finances from years before he became even a Presidential candidate would be reasonably relevant and necessary to such an investigation." *Id.* at 21.

37. The State of New York has been a willing and eager participant in this campaign to harass the President—both as an instrument to achieve the House's partisan agenda, and in direct pursuit of its own.

38. For example, Letitia James—the Attorney General of New York and the State's "'chief law officer'" who oversees the district attorneys, *People v. Fuller*, 282 N.Y.S. 28, 49 (Gen. Sess. 1935)—took office in 2019 following a campaign where she promised to "begin … an investigation into the Trump Administration with respect to his finances in the State of New York" and bring "the days of Donald Trump … to an end." On several occasions she stated, "The president of the United States has to worry about three things: 1. Mueller 2. Cohen, and 3. Tish James. We're all closing in on him." She promised that, if elected, "we will join with law enforcement and other attorneys general across this nation in removing this president from office." "I will be shining a bright light into every dark corner of his real estate dealings." "[W]e're going to definitely sue him. We're going to be a real pain in the ass. He's going to know my name personally." The Attorney General pledged to "root out corruption" in "DC" by "[i]nvestigat[ing] Trump businesses." She released a three-point plan explaining how she would "[f]ight[] corruption in the Trump Administration." The Attorney General also tweeted to Democrats in Congress, promising "to help Democrats take on Donald Trump" and "investigate" him.

39. The New York Legislature has been equally relentless. Shortly before the President's inauguration, Senator Brad Hoylman (D-Manhattan) introduced Senate Bill S8217. His bill would have required candidates for President to publicly disclose their federal income tax returns from the last

five years, or else their names would not appear on the New York ballot and they could not receive New York's electoral votes. Lest anyone be confused about the target of S8217, Senator Hoylman named it the Tax Returns Uniformly Made Public Act, or TRUMP Act.

40. When the TRUMP Act failed to pass, Senator Hoylman quickly devised another plan to expose the President's finances. Working with Assemblymember Buchwald (D-Westchester), the two introduced Assembly Bill A7462 and Senate Bill S5572—the Tax Returns Uphold Transparency and Honesty Act, or TRUTH Act. The TRUTH Act would have required the Commissioner to publish the President's state income tax returns from the last five years. Although the TRUTH Act would have applied to other officials who run for statewide office, its true target was President Trump. After introducing the legislation, Senator Hoylman, Assembly Member Buchwald, and others held a press conference where they stood in front of a red banner with white lettering that said "#ReleaseTheReturns." Assemblymember Buchwald remarked: "If lawmakers in Washington won't force President Trump to release his returns," Senator Hoylman added, "lawmakers in Albany should instead." "Trump broke over four decades worth of tradition by not releasing his returns, by thumbing his nose at the American people"; "[w]e want to reverse that, and we think we are in a unique position as New Yorkers to do so."

41. When the TRUTH Act failed to pass, Senator Hoylman and Assembly Member Buchwald devised a third way to target the President. By this time, the House Ways and Means Committee had formally requested the President's federal returns and the Treasury Department had suggested that the request was illegal. So Senator Hoylman and Assembly Member Buchwald devised legislation that would use the Committee's request for the President's federal returns as grounds for New York to disclose his state returns to Congress. They named the legislation the Tax Returns Released Under Specific Terms Act, or TRUST Act. It passed on party lines. Both opponents and supporters acknowledged that the TRUST Act was "obviously political in nature" and "a law that is clearly designed to help a Democratic Congress access Donald Trump's tax returns."

III. The Subpoena to Mazars

42. In recent months, the District Attorney of New York County has joined this campaign of harassing the President by obtaining and exposing his financial information.

43. On August 1, 2019, the District Attorney issued a grand jury subpoena to The Trump Organization for the following documents and communications concerning the President:

> 1. For the period of June 1, 2015, through September 20, 2018, any and all documents and communications that relate to, reference, concern, or reflect:
>
> a. payments made for the benefit of or agreements concerning Karen McDougal,
>
> b. payments made for the benefit of or agreements concerning Stephanie Clifford aka Stormy Daniels aka Peggy Peterson,
>
> c. payments made to or agreements with Michael Cohen or American Media, Inc. that concern Karen McDougal or Stephanie Clifford aka Stormy Daniels aka Peggy Peterson,
>
> including but not limited to documents and communications involving:
>
> - Resolution Consultants LLC
> - Essential Consultants LLC aka EC LLC
> - Entities owned or controlled by Michael Cohen
> - Michael Cohen
> - David Dennison
> - Keith Davidson
> - Keith M. Davidson & Associates
> - American Media, Inc.
> - National Enquirer
> - David Pecker
> - Dylan Howard
> - Hope Hicks
> - Jill Martin
> - Jeffrey McConney
> - Deborah Tarasoff
> - Donald Trump, Jr.
> - Allen Weisselberg.
>
> The items sought by this demand include without limitation: emails, memoranda, and other communications; invoices; agreements, including without limitation retainer agreements; accounting and other book entries or backup documents; general ledger records; wire transfer requests and related records, check images, bank statements, and any other evidence of payments or installments; and organizational documents and agreements, including

without limitation articles of incorporations, limited liability agreements, and minutes of director or member meetings.

2. For the period of June 1, 2015, through September 20, 2018, any and all documents and communications that relate to, reference, concern, or reflect Michael Cohen's employment by or work on behalf of Donald Trump or the Trump Organization at any time, including without limitation:

   invoices, payment records, human resource records, W2s, 1099s, emails, memoranda, and other communications.

44. The subpoena did not call for tax returns.

45. The President's attorneys immediately opened a dialogue with the District Attorney's Office and began collecting, and eventually, producing documents called for by the subpoena. But the District Attorney's Office soon revealed that it read the subpoena to cover The Trump Organization's tax returns. When the President's attorneys resisted that implausible interpretation, the District Attorney's office decided to circumvent the President by issuing a new subpoena to Mazars, a neutral third-party custodian, instead.

46. On August 29, 2019, the District Attorney issued a grand-jury subpoena to Mazars.

47. The subpoena orders Mazars to produce a list of records concerning the President:

1. For the period of January 1, 2011 to the present, with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):

   a. Tax returns and related schedules, in draft, as-filed, and amended form;

   b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;

   c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);

   d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and

e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,

i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and

ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

48. Quite remarkably, the District Attorney's subpoena to Mazars is identical to the House Oversight Committee's subpoena to Mazars (except for a few stylistic edits). The only exception is paragraph 1.a. The House Oversight Committee did not ask Mazars for the President's tax returns, but the District Attorney (following the lead of the House Ways and Means Committee) did. Essentially, then, the District Attorney cut-and-pasted the House Oversight and House Ways and Means subpoenas into a document and sent them to Mazars.

49. The following table illustrates how each provision of the District Attorney's subpoena (other than paragraph 1.a) precisely tracks the House Oversight Committee's subpoena.

House Oversight Committee	District Attorney
Unless otherwise noted, the time period covered by this subpoena includes calendar years 2011 through 2018.	1. For the period of January 1, 2011 to the present,
With respect to Donald J. Trump, Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, the Trump Old Post Office LLC, the Trump Foundation, and any parent, subsidiary, affiliate, joint venture, predecessor, or successor of the foregoing:	with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):
	a. Tax returns and related schedules, in draft, as-filed, and amended form;
1. All statements of financial condition, annual statements, periodic financial reports, and	b. Any and all statements of financial condition, annual statements, periodic financial reports,

independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;	and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;
2. Without regard to time, all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in Item Number 1;	c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);
3. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in Item Number 1, or any summaries of such documents and records relied upon, or any requests for such documents and records; and	d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and
4. All memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in Item Number 1, including, but not limited to:	e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,
a. all communications between Donald Bender and Donald J. Trump or any employee or representative of the Trump Organization; and	i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and
b. all communications related to potential concerns that records, documents, explanations, or other information, including significant judgments, provided by Donald J. Trump or other individuals from the Trump Organization, were incomplete, inaccurate, or otherwise unsatisfactory.	ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

50. The District Attorney's subpoena directs Mazars to produce the information by 2:00 p.m. on September 19, 2019.

51. As with the first subpoena, the President's attorneys—the true party-in-interest—contacted the District Attorney's office to engage in good-faith negotiations concerning the Mazars subpoena.

52. Yet the District Attorney's office refused to narrow the subpoena, allow more time for negotiations, or (unlike the House Oversight and Intelligence Committees) even stay enforcement

of the subpoena while the parties litigate over its validity. Yesterday, the District Attorney offered to give Mazars until September 23, 2019 to produce the portion of the subpoena calling for tax records—an extension of only two business days for a mere subset of the requested documents.

53. The subpoena is a bad faith effort to harass the President by obtaining and exposing his confidential financial information, not a legitimate attempt to enforce New York law. It precisely mirrors the House Oversight Committee's subpoena to Mazars and the House Ways and Means Committee's subpoena for the President's tax returns—themselves blatant efforts to obtain the President's confidential information to score political points. The District Attorney is duplicating the House's efforts even though New York has no jurisdiction over the topics that the House (falsely) claims to be studying: federal financial-disclosure laws and federal tax law. One particularly egregious example of this is the subpoena's request for information about the Trump Old Post Office—a *D.C.*-based company that operates the President's *D.C.*-based hotel.

54. The District Attorney's efforts are aimed directly at the President. His first subpoena sought information about the President and was issued to the company that the President solely owns and that bears his name. As the House General Counsel admitted when defending the same subpoena, "you do have to look at this in terms of these are the records of the President." O.A. Transcript 77, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir. July 12, 2019). The District Attorney's subpoena to Mazars, moreover, was issued to the President's accountant for the sole purpose of obtaining documents about the President from a party with little incentive to challenge it. The Mazars subpoena specifically names the President as a target; and it seeks, among other things, his individual tax returns.

55. But Mazars cannot disclose any of the President's information unless the District Attorney's subpoena is valid and enforceable. Under its contracts with the President, Mazars must abide by the American Institute of CPAs' ethical rules, which prohibit accountants from "disclos[ing] any confidential client information without the specific consent of the client." AICPA Code of Prof'l Conduct §1.700.001.01. New York and federal law impose the same duty. *See* 8 N.Y.C.R.R. §29.10(c);

26 U.S.C. §7216. A subpoena does not relieve Mazars from these duties, unless the subpoena is "validly issued and enforceable." AICPA Code §1.700.001.02.

56. The President brings this suit to challenge the validity and enforceability of the District Attorney's subpoena. Mazars now faces a Hobson's choice: ignore the subpoena and risk contempt, or comply with the subpoena and risk liability to the President if the subpoena is invalid or unenforceable. To resolve these conflicting commands, courts instruct third-party accountants like Mazars to not disclose the subpoenaed materials until the dispute over the subpoena's validity is finally resolved in court: "[AICPA] Rule 301 … explains that it 'shall not be construed ... to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons.' But [the client] challenges the enforceability of a subpoena …. Thus [the accountant] c[an] refuse to produce the documents, thereby allowing [the client to litigate the subpoena], without violating its obligation to comply with enforceable subpoenas." *United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010). The District Attorney thus cannot be allowed to take any action against Mazars until this litigation is finally resolved.

CLAIM FOR RELIEF

57. The President incorporates all his prior allegations.

58. The U.S. Constitution, including Article II and the Supremacy Clause, prohibits the District Attorney from criminally investigating, prosecuting, or indicting the President while he is in office.

59. The subpoena to Mazars is an attempt to criminally investigate and prosecute the President. That is, after all, the whole point of a grand-jury subpoena. The subpoena, moreover, names the President, seeks his records, and was issued to his accountant for the purpose of circumventing his rights. The subpoena also targets the President's businesses—precisely because it is the President who owns them.

60. The subpoena thus violates the Constitution. It cannot be enforced until after the President leaves office.

WHEREFORE, The President asks this Court to enter judgment in his favor and provide the following relief:

a. A declaratory judgment that the subpoena is invalid and unenforceable while the President is in office;

b. A permanent injunction staying the subpoena while the President is in office;

c. A permanent injunction prohibiting the District Attorney's office from taking any action to enforce the subpoena, from imposing sanctions for noncompliance with the subpoena, and from inspecting, using, maintaining, or disclosing any information obtained as a result of the subpoena, until the President is no longer in office;

d. A permanent injunction prohibiting Mazars from disclosing, revealing, delivering, or producing the requested information, or otherwise complying with the subpoena, until the President is no longer in office;

e. A temporary restraining order and preliminary injunction prohibiting Mazars from disclosing, revealing, delivering, or producing the requested information, or otherwise complying with the subpoena, until the subpoena's validity has been finally adjudicated on the merits;

f. A temporary restraining order and preliminary injunction prohibiting the District Attorney's office from taking any action to enforce the subpoena, until the subpoena's validity has been finally adjudicated on the merits;

g. The President's reasonable costs and expenses, including attorney's fees; and

h. All other preliminary and permanent relief to which the President is entitled.

Dated: September 19, 2019

Respectfully submitted,

s/ William S. Consovoy

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CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

Judge Victor Marrero
U.S. District Court Judge
Southern District of New York
500 Pearl Street, New York, N.Y.
By FAX: 212-805-6382

Re: Donald J. Trump v. Cyrus R. Vance, Jr.
19CV. 8694(VM)

Dear Judge Marrero:

Pursuant to a conference among the parties and your clerk in chambers this morning, the parties have agreed to the following schedule subject to the Court's approval: the District Attorney will file a response to the Complaint and Motion for a Temporary Restraining Order by the close of business on Monday, September 23, 2019; the plaintiff's reply will be filed by the close of business on Tuesday September 24, 2019; and the parties will appear for oral argument on Wednesday, September 25, 2019 at 9:30 am.

We await approval from the Court or further instruction as to the schedule proposed above.

Additionally, during this morning's conference the District Attorney agreed to stay enforcement of and compliance with the subpoena issued to Mazars LLP until Wednesday, September 25, 2019 at 1:00 pm, or such other time as determined by the Court.

Very truly yours,

Christopher Conroy
Chief, Major Economic Crimes Bureau
District Attorney of New York

Request GRANTED. The briefing schedule and hearing on the motion for injunctive relief in this action shall be as set forth above.

SO ORDERED.

9-19-19
DATE

VICTOR MARRERO, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,
Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York;

and

MAZARS USA, LLP,
Defendants.

Case No. 19CV8694

JUDGE MARRERO

DECLARATION OF WILLIAM S. CONSOVOY

I, William S. Consovoy, declare:

1. I am an attorney at the law firm Consovoy McCarthy PLLC, counsel for Plaintiff in the above-captioned action.

2. I am over the age of eighteen and am under no mental disability or impairment. I have personal knowledge of the following facts and, if called as a witness, would competently testify to them.

3. Exhibit A to this declaration is a true and accurate copy of an August 29, 2019 grand-jury subpoena issued by Solomon Shinerock, on behalf of the District Attorney of the County of New York, to Mazars USA, LLP.

4. Exhibit B to this declaration is a true and accurate copy of an August 1, 2019 grand-jury subpoena issued by Solomon Shinerock, on behalf of the District Attorney of the County of New York, to The Trump Organization.

5. Exhibit C to this declaration is a true and accurate copy of a September 18, 2019 letter from Plaintiff's attorneys to Christopher Conroy of the New York County District Attorney's office.

Per 28 U.S.C. § 1746, I declare under penalty of perjury that the above is true and correct.

Executed on September 19, 2019

/s/ William S. Consovoy

William S. Consovoy
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com

Exhibit A

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

August 29, 2019

VIA HAND DELIVERY
Mazars USA LLP
Attn: Custodian of Records
135 West 50th Street
New York, NY 10020

Re: Investigation Number 2018-00403803
Return Date: September 19, 2019

To Whom It May Concern:

Enclosed please find a subpoena seeking records relating to the above-referenced investigation. These records are needed on or before September 19, 2019.

In lieu of appearing personally with the requested data, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny. Please note that electronic copies are preferred.

If you have any problems or questions concerning the subpoena or the manner of delivery, please contact me at the number below. Your attention to this matter is greatly appreciated.

Respectfully yours,

Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Enc.

SUBPOENA

(Duces Tecum)

FOR A WITNESS TO ATTEND THE

GRAND JURY

In the Name of the People of the State of New York

To: Custodian of Records
Mazars USA LLP

YOU ARE COMMANDED to appear before the **GRAND JURY** of the County of New York, at the Grand Jury Room 907, of the Criminal Courts Building at One Hogan Place, between Centre and Baxter streets, in the Borough of Manhattan of the City, County and State of New York, on **September 19, 2019** at **2:00 p.m.** of the same day, **as a witness in a criminal proceeding:**

Investigation into the Business and Affairs of John Doe (2018-00403803),

AND, YOU ARE DIRECTED TO BRING WITH YOU AND PRODUCE AT THE TIME AND PLACE AFORESAID, THE FOLLOWING ITEMS IN YOUR CUSTODY:

SEE EXHIBIT A – ATTACHED

IF YOU FAIL TO ATTEND AND PRODUCE SAID ITEMS, you may be adjudged guilty of a Criminal Contempt of Court, and liable to a fine of one thousand dollars and imprisonment for one year.

Dated in the County of New York,
August 29, 2019

CYRUS R. VANCE, JR.
District Attorney, New York County

By: Solomon Shinerock

Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Note: In lieu of appearing personally with the requested documents, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny.

Inv. Number: 2018-00403803

EXHIBIT A TO SUBPOENA TO MAZARS USA LLP
DATED AUGUST 29, 2019

ITEMS TO BE PRODUCED are those in the actual and constructive possession of Mazars USA LLP, its related predecessors, entities, agents, officers, employees and officials over which it has control, including without limitation subsidiaries:

1. For the period of January 1, 2011 to the present, with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):

    a. Tax returns and related schedules, in draft, as-filed, and amended form;

    b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;

    c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);

    d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and

    e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,

        i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and

        ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

DEFINITIONS AND INSTRUCTIONS

As used herein, unless otherwise indicated, the following terms shall have the meanings set forth below:

A. The terms "relate," "reference," "concern," "reflect," "include," and "including without limitation," in whatever tense used, shall be construed as is necessary in each case to make the request to produce inclusive rather than exclusive, and are intended to convey, as appropriate in context, the concepts of comprising, respecting, referring to, embodying, evidencing, connected with, commenting on, concerning, responding to, showing, refuting, describing, analyzing, reflecting, presenting, and consisting of, constituting, mentioning, defining, involving, explaining, or pertaining to in any way, expressly or impliedly, to the matter called for.

B. The words "and," "or," "any" and "all" shall be construed as is necessary in each case to make each request to produce inclusive rather than exclusive.

C. Terms in the plural include the singular and terms in the singular include the plural. Terms in the male include the female and terms in the female include the male. Neutral gender terms include all.

D. "Document" includes without limitation, any written, printed, typed, photocopied, photographic, recorded or otherwise created or reproduced communication or representation, whether comprised of letters, words, numbers, pictures, sounds or symbols, or any combination thereof, in the form maintained, having access to, constructively possessed, physically possessed, and controlled. This definition includes copies or duplicates of documents contemporaneously or subsequently created that have any non-conforming notes or other markings, and drafts, preliminary versions, and revisions of such. It includes, without limitation, correspondence, memoranda, notes, records, letters, envelopes, telegrams, faxes, messages, emails, voice mails, instant messenger services, studies, analyses, contracts, agreements, working papers, summaries, work papers, calendars, diaries, reports. It includes, without limitation, internal and external communications of any type. It includes without limitation documents in physical, electronic, audio, digital, video existence, and all data compilations from which the data sought can be obtained, including electronic and computer as well as by means of other storage systems, in the form maintained and in usable form.

E . "Communication" includes every means of transmitting, receiving or recording transmission or receipt of facts, information, opinion, data, or thoughts by one person, and between one and more persons, entities, or things.

Exhibit B

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

August 1, 2019

VIA EMAIL (marc.mukasey@mukaseylaw.com)
The Trump Organization
Attn: Custodian of Records
727 Fifth Avenue
New York, NY 10022

Re: Investigation Number 2018-00403803
Return Date: August 15, 2019

To Whom It May Concern:

Enclosed please find a subpoena seeking records relating to the above-referenced investigation. These records are needed on or before August 15, 2019.

In lieu of appearing personally with the requested documents, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny. Please note that electronic copies are preferred.

To the extent that you withhold documents pursuant to a claim of privilege, please provide a log setting forth, as to each document, the legal basis for the claim of privilege, the type of document, its general subject matter, date, author, sender and recipient where applicable, and such other information as is sufficient to determine the claim of privilege.

If you have any problems or questions concerning the subpoena or the manner of delivery, please contact me at the number below. Your attention to this matter is greatly appreciated.

Sincerely,

Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Enc.

SUBPOENA

(Duces Tecum)

FOR A WITNESS TO ATTEND THE

GRAND JURY

In the Name of the People of the State of New York

To: Custodian of Records
The Trump Organization

YOU ARE COMMANDED to appear before the **GRAND JURY** of the County of New York, at the Grand Jury Room 907, of the Criminal Courts Building at One Hogan Place, between Centre and Baxter streets, in the Borough of Manhattan of the City, County and State of New York, on **August 15, 2019** at **2:00 p.m.** of the same day, **as a witness in a criminal proceeding:**

Investigation into the Business and Affairs of John Doe (2018-00403803),

AND, YOU ARE DIRECTED TO BRING WITH YOU AND PRODUCE AT THE TIME AND PLACE AFORESAID, THE FOLLOWING ITEMS IN YOUR CUSTODY:

SEE EXHIBIT A – ATTACHED

IF YOU FAIL TO ATTEND AND PRODUCE SAID ITEMS, you may be adjudged guilty of a Criminal Contempt of Court, and liable to a fine of one thousand dollars and imprisonment for one year.

Dated in the County of New York,
August 1, 2019

CYRUS R. VANCE, JR.
District Attorney, New York County

By: Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Note: In lieu of appearing personally with the requested documents, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny.

Inv. Number: 2018-00403803

EXHIBIT A TO SUBPOENA TO THE TRUMP ORGANIZATION
DATED AUGUST 1, 2019

ITEMS TO BE PRODUCED are those in the actual and constructive possession of the Trump Organization, its entities, agents, officers, employees and officials over which it has control, including without limitation its subsidiaries:

1. For the period of June 1, 2015, through September 20, 2018, any and all documents and communications that relate to, reference, concern, or reflect:

   a. payments made for the benefit of or agreements concerning Karen McDougal,
   b. payments made for the benefit of or agreements concerning Stephanie Clifford aka Stormy Daniels aka Peggy Peterson,
   c. payments made to or agreements with Michael Cohen or American Media, Inc. that concern Karen McDougal or Stephanie Clifford aka Stormy Daniels aka Peggy Peterson,

   including but not limited to documents and communications involving:

   - Resolution Consultants LLC
   - Essential Consultants LLC aka EC LLC
   - Entities owned or controlled by Michael Cohen
   - Michael Cohen
   - David Dennison
   - Keith Davidson
   - Keith M. Davidson & Associates
   - American Media, Inc.
   - National Enquirer
   - David Pecker
   - Dylan Howard
   - Hope Hicks
   - Jill Martin
   - Jeffrey McConney
   - Deborah Tarasoff
   - Donald Trump, Jr.
   - Allen Weisselberg.

   The items sought by this demand include without limitation: emails, memoranda, and other communications; invoices; agreements, including without limitation retainer agreements; accounting and other book entries or backup documents; general ledger records; wire transfer requests and related records, check images, bank statements, and any other evidence of payments or installments; and organizational documents and agreements, including without limitation articles of incorporations, limited liability agreements, and minutes of director or member meetings.

2. For the period of June 1, 2015, through September 20, 2018, any and all documents and communications that relate to, reference, concern, or reflect Michael Cohen's employment by or work on behalf of Donald Trump or the Trump Organization at any time, including without limitation:

invoices, payment records, human resource records, W2s, 1099s, emails, memoranda, and other communications.

3. For any responsive documents or communications withheld under a claim of privilege, please provide a log setting forth, as to each such document or communication, the legal basis for the claim of privilege, the type of document or communication, its general subject matter, date, author, sender and recipient where applicable, and such other information as is sufficient to determine the claim of privilege.

DEFINITIONS AND INSTRUCTIONS

As used herein, unless otherwise indicated, the following terms shall have the meanings set forth below:

A. The terms "relate," "reference," "concern," "reflect," "include," and "including without limitation," in whatever tense used, shall be construed as is necessary in each case to make the request to produce inclusive rather than exclusive, and are intended to convey, as appropriate in context, the concepts of comprising, respecting, referring to, embodying, evidencing, connected with, commenting on, concerning, responding to, showing, refuting, describing, analyzing, reflecting, presenting, and consisting of, constituting, mentioning, defining, involving, explaining, or pertaining to in any way, expressly or impliedly, to the matter called for.

B. The words "and," "or," "any" and "all" shall be construed as is necessary in each case to make each request to produce inclusive rather than exclusive.

C. Terms in the plural include the singular and terms in the singular include the plural. Terms in the male include the female and terms in the female include the male. Neutral gender terms include all.

D. "Document" includes without limitation, any written, printed, typed, photocopied, photographic, recorded or otherwise created or reproduced communication or representation, whether comprised of letters, words, numbers, pictures, sounds or symbols, or any combination thereof, in the form maintained, having access to, constructively possessed, physically possessed, and controlled. This definition includes copies or duplicates of documents contemporaneously or subsequently created that have any non-conforming notes or other markings, and drafts, preliminary versions, and revisions of such. It includes, without limitation, correspondence, memoranda, notes, records, letters, envelopes, telegrams, faxes, messages, emails, voice mails, instant messenger services, studies, analyses, contracts, agreements, working papers, summaries, work papers, calendars, diaries, reports. It includes, without limitation, internal and external communications of any type. It includes without limitation documents in physical, electronic, audio, digital, video existence, and all data compilations from which the data sought can be obtained, including electronic and computer as well as by means of other storage systems, in the form maintained and in usable form.

E. "Communication" includes every means of transmitting, receiving or recording transmission or receipt of facts, information, opinion, data, or thoughts by one person, and between one and more persons, entities, or things.

Exhibit C

MUKASEY
FRENCHMAN & SKLAROFF LLP

2 Grand Central Tower
140 East 45th Street, Suite 17A
New York, NY 10017

Marc L. Mukasey
Partner
212-466-6406
Marc.mukasey@mfsllp.com

September 18, 2019

VIA EMAIL AND OVERNIGHT MAIL
Christopher Conroy (CONROYC@dany.nyc.gov)
Chief, Major Economic Crimes Bureau
District Attorney's Office, New York County
One Hogan Place
New York, NY 10013

Re: Grand Jury Subpoena Duces Tecum to Mazars USA LLP

Dear Mr. Conroy:

This letter addresses the issues discussed in today's meeting and our follow-up phone call.

As you know, we represent President Donald J. Trump and the Trump Organization in connection with a grand jury subpoena issued to Mazars USA LLP ("Mazars"). Mazars is the outside accountant to President Trump and the Trump Organization and, thus, is merely a custodian of the records sought by the subpoena. Our clients are the true parties-in-interest. We write to request, as we did at the meeting, that you temporarily suspend enforcement of the subpoena to allow for the proper and orderly resolution of the important constitutional issues raised therein. We submit that such a procedure best promotes the interests of fairness and justice—as well as respect for the Office of the President. **We are asking for a written statement from your office by 1pm on September 18, 2019, that you are willing to suspend enforcement of the Mazars subpoena pending further negotiation and/or litigation.**

By way of background, on August 1, 2019, your office issued a grand jury subpoena to the Trump Organization in connection with a certain investigation. Upon receipt of the subpoena, the Trump Organization immediately expressed its willingness to cooperate with your office and it has done so. The Trump Organization has produced hundreds of documents in response to the subpoena—including many that you identified as priority items—and additional responsive documents are being gathered, reviewed, and prepared for production. Notably, the subpoena does not call for the Trump Organization's tax returns. But when you nevertheless indicated otherwise, we agreed to meet and discuss the issue. In the meantime, the Trump Organization has maintained an open line of communication with your office, adhered to deadlines, and conducted itself in a cordial and amicable manner.

Two weeks ago, you issued a grand jury subpoena to Mazars in connection with the same investigation. That subpoena calls for Mazars to produce, among other things, many years of President Trump's personal tax returns and those of the Trump Organization. The subpoena is returnable on September 19, 2019, and, thus far, you have refused to grant Mazars an extension of time to produce the requested documents.

The issues raised by the Mazars subpoena are important and unprecedented. They raise serious constitutional issues that should be properly resolved in court. Efforts to obtain the President's tax returns are the subject of litigation in the United States Court of Appeals for the Second Circuit, the United States

Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia. The issues at stake are simply too significant to place Mazars in the untenable position of producing the President's tax returns on September 19th or being held in contempt.

Resolution of this matter of first impression will set the course for future occupants of the Oval Office. It should be handled prudently. That is why the House Oversight Committee agreed to suspend enforcement of its subpoena to Mazars so the constitutional dispute could be litigated in an orderly fashion without burdening courts with requests for emergency relief. It would be deeply troubling if your office is unwilling to do the same here.

We respectfully request that you approach this matter with the same rectitude and courtesy Congress did when it issued subpoenas for the President's records to Mazars, Capital One, and Deutsche Bank: suspend enforcement of the subpoena to Mazars so the President of the United States can be heard in court. No prejudice will accrue to your office - your investigation appears to be historical, there is no danger of spoliation, and there is no urgency to the matter.

Finally, your blanket refusal to grant a brief extension to Mazars is inconsistent with how state and federal investigations typically proceed. The undersigned counsel has vast experience in these matters and we, collectively, do not recall an instance where at least one brief adjournment was not granted while the parties explored their legal and negotiation options. Ignoring these normal practices smacks of selective enforcement against the President.

Thank you again for meeting and for arranging a meeting with the District Attorney. We look forward to hearing from you in writing by 1pm on September 18th, and to working with you on this matter in a professional, orderly fashion.

Very truly yours,

Marc L. Mukasey
Founding Partner
Mukasey Frenchman & Sklaroff LLP
140 East 45th Street
New York, New York 10017

WC/MM

William S. Consavoy
Consavoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA. 22209

AF/MM

Alan S. Futerfas
565 Fifth Avenue
New York, New York 10017

cc: Cyrus R. Vance Jr., District Attorney
ADA Solomon Shinerock

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,
Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York;

and

MAZARS USA, LLP,
Defendants.

Case No. 1:19-cv-08694 (VM)

VIA ECF

DECLARATION OF SOLOMON SHINEROCK

Solomon Shinerock, an attorney admitted to practice before this Court, declares that:

1. I am an Assistant District Attorney in the office of Cyrus R. Vance, Jr., District Attorney of the County of New York (the "Office"). I am one of the assistants assigned to the investigation from which the captioned case arises. Consistent with its investigative function, the Office obtains records received in response to Grand Jury subpoenas, and accords them the highest level of confidentiality available under applicable laws governing Grand Jury secrecy.

2. I submit this declaration and the accompanying memorandum of law in support of the Office's motion to dismiss the Complaint filed on September 19, 2019, and in opposition to the Plaintiff's motion for a temporary restraining order and a preliminary injunction, also filed on September 19, 2019.

3. I respectfully submit that the Plaintiff is not entitled to the relief he seeks, and request that the Court deny his motion in all respects and dismiss the Complaint.

4. I assert as true the facts set forth below and in the accompanying memorandum of law based on information and belief, the sources of which are a review of documents within the files of the District Attorney's Office, conversations with knowledgeable individuals, including defense counsel, and other sources as noted herein.

A. The Grand Jury Investigation targets New York conduct and has yet to conclude as to specific charges or defendants.

[redacted]

[redacted]

[redacted]

B. Compliance with the relevant Grand Jury subpoenas began without objection.

9. On August 1, 2019, the Trump Organization, LLC, was served with a Grand Jury subpoena (the "Trump Organization Subpoena"). It called for a range of records and communications from multiple individuals and entities relating to the so-called "hush money" payments to Stephanie Clifford and Karen McDougal, how those payments were reflected in the Trump Organization's books and records, and who was involved in determining how those payments would be reflected in the Trump Organization's books and records. On August 7, 2019, this Office spoke with counsel for the Trump Organization to discuss priorities and establish a production schedule, and conveyed that we believed that the subpoena called for tax records for the year 2017 (which is when at least some of the "hush money" payments were recorded on the Trump Organization's books). The Trump Organization produced records on August 15 and 29, and again on September 13, 2019. To date, the Trump Organization has produced 3376 responsive pages, but no tax records.

10. Despite a number of follow-up requests for tax returns, no specific objection was raised until a September 4, 2019 phone call, in which the Trump Organization's counsel expressed for the first time the belief that production of the tax records implicated constitutional issues. In a follow-up email of September 9, 2019, counsel expressed the belief that no tax records were responsive to the

subpoena. A true and accurate copy of the email communications described above is attached as Exhibit 1.

11. No party has objected to the Trump Organization Subpoena or challenged the Office's requests thereunder beyond the Trump Organization's assertion that the Trump Organization Subpoena does not call for tax records.

12. On August 29, 2019, Mazars USA LLP was lawfully served with the Grand Jury subpoena that is the basis for the present suit (the "Mazars Subpoena"). The Mazars Subpoena was drafted and served days before the Trump Organization's objections to producing tax returns. It sought the same financial records that Mazars had already been called on to produce in response to third party requests, and in addition called for tax records for the years 2011 through the present. The Office spoke with counsel for Mazars in a series of phone calls to establish an agreed-upon production schedule beginning on, and extending past, the September 19, 2019 return date. Mazars did not raise any of its own objections to the subpoena.

C. The Trump Organization's request that the Office suspend the Mazars Subpoena lacked merit and foundered on the issue of taxes.

13. As of September 13, 2019, the Office had not been made aware of any intent to intervene and quash the Mazars Subpoena, and sent separate emails to counsel for the Trump Organization and for Mazars, stating that we deemed the Mazars Subpoena valid and returnable on September 19, 2019, absent a specific agreement or contrary court order.

14. On September 17, 2019, counsel for the Trump Organization met with the Office and asked for a suspension of compliance with the Mazars Subpoena pending further negotiation or litigation. Counsel articulated no legal objection to the Mazars Subpoena, and made clear that even if we negotiated a limited production, its clients would never agree to the production of tax records. The Office declined.

15. On September 18, 2019, the Trump Organization again met with the Office and requested a suspension of tax-related portion of the Mazars Subpoena for several days to allow counsel time to prepare briefs to challenge the subpoena. In response, the Office agreed to delay enforcement of the Mazars Subpoena until September 23, 2019 as it pertained to tax records, to allow the attorneys additional time to prepare their objections. True and accurate copies of three letters memorializing these discussions are attached as Exhibits 2, 3, and 4.

16. On September 19, 2019, attorneys for the Trump Organization sent the Office copies of the Plaintiff's filings in this case.

D. Prior and continuing investigations have not threatened irreparable harm, and the Plaintiff never objected to them on the grounds he raises in the present suit.

17. Public reporting has covered a number of prior and continuing investigations and prosecutions involving the Plaintiff, his associates, and related entities. Those matters have not caused irreparable harm, nor has the Plaintiff claimed that they invaded the rights he seeks to vindicate here. This is so despite that, as reported, they were marked by the robust exercise of grand jury and other investigative powers, and involved grave conduct:

a. Special Counsel Robert Mueller oversaw an approximately two-year investigation addressing (1) whether the Plaintiff, his presidential campaign, or his associates were involved in unlawful efforts by Russia to interfere with the 2016 election, and (2) whether the Plaintiff, while President, was implicated in obstructing justice. According to public reporting, the Special Counsel's investigation involved among other things over 2,800 subpoenas, nearly 500 search warrants, and approximately 500 witnesses. It resulted in the indictment of thirty-four individuals, including foreign nationals and individuals associated with the Plaintiff and the Plaintiff's presidential campaign, on charges including

conspiracy to defraud the United States and lying to federal law enforcement officers about contacts with foreign governments.

b. Federal prosecutors in multiple districts have investigated the origins of financing for Plaintiff's inauguration committee, how the money was spent, and whether any donations to the committee resulted in favors or special access.

c. The New York Department of Financial Services has issued at least one subpoena seeking records and communications related to a non-criminal investigation into allegations that the Trump Organization and its officers engaged in insurance fraud.

d. The New York Attorney General's Office has issued at least one subpoena seeking records and communications related to a currently non-criminal investigation into allegations that the Trump Organization and its officers engaged in bank fraud.

e. Federal prosecutors obtained the conviction of Michael D. Cohen for tax fraud, false statements, and campaign finance violations, committed during the period that Mr. Cohen was counsel to the Plaintiff. The charge against Cohen also referred to an "Individual One." In testimony before Congress on February 27, 2019, Cohen testified under oath that "Individual One was in fact President Donald J. Trump."

f. Federal prosecutors reached a non-prosecution agreement with American Media, Inc., related to an investigation into the lawfulness of "hush money" payments made in consultation with and for the benefit of the Plaintiff. These payments were made in order to prevent allegations that he had an extra-marital affair from airing in the run-up to the 2016 election.

WHEREFORE, I respectfully request that the Court deny Plaintiff's motion for a temporary restraining order and a preliminary injunction, and dismiss the Complaint.

I declare under penalty of perjury and pursuant to 28 United States Code section 1746 that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: New York, New York
September 23, 2019

Respectfully submitted,

s/ Solomon Benjamin Shinerock

Solomon Benjamin Shinerock
Bar Number: SS5855
Assistant District Attorney
New York County District Attorney's Office
80 Centre Street
New York, New York 10013
shinerocks@dany.nyc.gov
212-335-9567

EXHIBIT 1
[REDACTED]

EXHIBIT 2

MUKASEY
FRENCHMAN & SKLAROFF LLP

2 Grand Central Tower
140 East 45th Street, Suite 17A
New York, NY 10017

Marc L. Mukasey
Partner
212-466-6406
Marc.mukasey@mfsllp.com

September 18, 2019

VIA EMAIL AND OVERNIGHT MAIL
Christopher Conroy (CONROYC@dany.nyc.gov)
Chief, Major Economic Crimes Bureau
District Attorney's Office, New York County
One Hogan Place
New York, NY 10013

Re: Grand Jury Subpoena Duces Tecum to Mazars USA LLP

Dear Mr. Conroy:

This letter addresses the issues discussed in today's meeting and our follow-up phone call.

As you know, we represent President Donald J. Trump and the Trump Organization in connection with a grand jury subpoena issued to Mazars USA LLP ("Mazars"). Mazars is the outside accountant to President Trump and the Trump Organization and, thus, is merely a custodian of the records sought by the subpoena. Our clients are the true parties-in-interest. We write to request, as we did at the meeting, that you temporarily suspend enforcement of the subpoena to allow for the proper and orderly resolution of the important constitutional issues raised therein. We submit that such a procedure best promotes the interests of fairness and justice—as well as respect for the Office of the President. **We are asking for a written statement from your office by 1pm on September 18, 2019, that you are willing to suspend enforcement of the Mazars subpoena pending further negotiation and/or litigation.**

By way of background, on August 1, 2019, your office issued a grand jury subpoena to the Trump Organization in connection with a certain investigation. Upon receipt of the subpoena, the Trump Organization immediately expressed its willingness to cooperate with your office and it has done so. The Trump Organization has produced hundreds of documents in response to the subpoena—including many that you identified as priority items—and additional responsive documents are being gathered, reviewed, and prepared for production. Notably, the subpoena does not call for the Trump Organization's tax returns. But when you nevertheless indicated otherwise, we agreed to meet and discuss the issue. In the meantime, the Trump Organization has maintained an open line of communication with your office, adhered to deadlines, and conducted itself in a cordial and amicable manner.

Two weeks ago, you issued a grand jury subpoena to Mazars in connection with the same investigation. That subpoena calls for Mazars to produce, among other things, many years of President Trump's personal tax returns and those of the Trump Organization. The subpoena is returnable on September 19, 2019, and, thus far, you have refused to grant Mazars an extension of time to produce the requested documents.

The issues raised by the Mazars subpoena are important and unprecedented. They raise serious constitutional issues that should be properly resolved in court. Efforts to obtain the President's tax returns are the subject of litigation in the United States Court of Appeals for the Second Circuit, the United States

Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia. The issues at stake are simply too significant to place Mazars in the untenable position of producing the President's tax returns on September 19th or being held in contempt.

Resolution of this matter of first impression will set the course for future occupants of the Oval Office. It should be handled prudently. That is why the House Oversight Committee agreed to suspend enforcement of its subpoena to Mazars so the constitutional dispute could be litigated in an orderly fashion without burdening courts with requests for emergency relief. It would be deeply troubling if your office is unwilling to do the same here.

We respectfully request that you approach this matter with the same rectitude and courtesy Congress did when it issued subpoenas for the President's records to Mazars, Capital One, and Deutsche Bank: suspend enforcement of the subpoena to Mazars so the President of the United States can be heard in court. No prejudice will accrue to your office - your investigation appears to be historical, there is no danger of spoliation, and there is no urgency to the matter.

Finally, your blanket refusal to grant a brief extension to Mazars is inconsistent with how state and federal investigations typically proceed. The undersigned counsel has vast experience in these matters and we, collectively, do not recall an instance where at least one brief adjournment was not granted while the parties explored their legal and negotiation options. Ignoring these normal practices smacks of selective enforcement against the President.

Thank you again for meeting and for arranging a meeting with the District Attorney. We look forward to hearing from you in writing by 1pm on September 18th, and to working with you on this matter in a professional, orderly fashion.

Very truly yours,

Marc L. Mukasey
Founding Partner
Mukasey Frenchman & Sklaroff LLP
140 East 45th Street
New York, New York 10017

William S. Consavoy
Consavoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA. 22209

Alan S. Futerfas
565 Fifth Avenue
New York, New York 10017

cc: Cyrus R. Vance Jr., District Attorney
ADA Solomon Shinerock

EXHIBIT 3

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

September 18, 2019

VIA EMAIL
Marc L. Mukasey (Marc.Mukasey@mfsllp.com)
Founding Partner, Mukasey Frenchman & Sklaroff LLP
2 Grand Central Tower
140 East 45th Street, Suite 17A
New York, NY 10017

William S. Consavoy
Consavoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA. 22209

Alan S. Futerfas
565 Fifth Avenue
New York, New York 10017

Re: Grand Jury Subpoena Duces Tecum to Mazars USA LLP

Dear Mr. Mukasey,

We write in response to your letter and your in-person presentation, both of this morning. As you know, Mazars USA LLP ("Mazars") was served with a subpoena three weeks ago on August 29, 2019 (the "Mazars Subpoena"), which called for the types of records that this Office routinely subpoenas in the course of our investigations. Our understanding is that as of the very next day, your clients had received notice of the Mazars Subpoena. To date you have not taken steps to intervene in court, nor have you asked, on behalf of Mazars, for additional time to enable production. Rather, you now ask, separately from Mazars, that we suspend the tax-related aspects of the investigation and provide you with additional time to challenge the Mazars Subpoena in court. You have made clear that your clients will never agree to the production of tax records, notwithstanding that such records are lawfully subpoenaed from a third-party.

Under these circumstances, and as we have conveyed to you before, Mazars must comply with the lawfully issued and served grand jury subpoena now pending, pursuant to a reasonable production schedule agreed to by Mazars and this Office on behalf of the Grand Jury. Your request that we suspend the tax-related aspects of the investigation into the New York conduct of New York entities is inconsistent with our unique obligations as prosecutors, and any legal challenges you may identify to the enforceability of the Mazars

Subpoena (which, to date, you have not articulated to us), should be decided by an appropriate court, as is done in the ordinary course of our investigations. In response to your request for additional time to be heard in court, this Office will notify Mazars that it need not respond to that portion of the subpoena calling for tax records until Monday, September 23, 2019.

Sincerely,

Christopher Conroy
Chief, Major Economic Crimes Bureau
New York County District Attorney's Office
212-335-3743

EXHIBIT 4

MUKASEY
FRENCHMAN & SKLAROFF LLP

2 Grand Central Tower
140 East 45th Street, Suite 17A
New York, NY 10017

Marc L. Mukasey
Partner
212-466-6406
Marc.mukasey@mfsllp.com

September 19, 2019

VIA EMAIL
Christopher Conroy (CONROYC@dany.nyc.gov)
Chief, Major Economic Crimes Bureau
District Attorney's Office, New York County
One Hogan Place
New York, NY 10013

Re: Grand Jury Subpoena Duces Tecum to Mazars USA LLP

Dear Mr. Conroy:

We write in response to your letter of September 18, 2019.

Your narrative is misleading. On August 1, 2019, you issued a subpoena to the Trump Organization. We immediately expressed our willingness to comply. Shortly thereafter, as we began to gather responsive documents, you claimed that the subpoena called for tax returns. We pointed out the obvious - it does not. Your response was to make an end-run around the President and his family business by seeking years of tax returns and other documents in a sweeping subpoena to Mazars.

We have since asked repeatedly to discuss this matter with you and/or for the return date on the Mazars subpoena – September 19, 2019 - to be temporarily suspended so the serious constitutional issues raised by your actions can properly be addressed through discussion or litigation. Put another way, all we have asked for is a fair opportunity for the President of the United States to be heard. You refused.

Very truly yours,

Marc L. Mukasey
Founding Partner

cc: Cyrus R. Vance Jr., District Attorney
ADA Solomon Shinerock

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,

Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York, and MAZARS USA, LLP,

Defendants.

19 Civ. 8694 (VM)

ORDER

VICTOR MARRERO, United States District Judge.

As set forth on the record during the oral argument held today, September 25, 2019, it is hereby

ORDERED that the stay of enforcement of and compliance with the subpoena issued to Mazars USA, LLP, which is scheduled to expire today, September 25, 2019 at 1:00 p.m. (see Dkt. No. 4), shall be extended to tomorrow, September 26, 2019 at 5:00 p.m. It is further

ORDERED that the parties in this action shall meet and confer regarding their respective concerns, and inform the Court, through the submission of a joint letter by tomorrow, September 26, 2019 at 4:00 p.m., whether they have agreed upon a process for proceeding in the interim period between expiration of the current stay and the issuance of the Court's decision. Finally, it is

ORDERED that the request of the United States (Dkt. No. 24) for additional time to determine whether to participate in this action is **GRANTED**. The United States shall have until close of business on Monday, September 30, 2019, to inform the Court and the parties whether it intends to participate in this action. If the United States determines that it will participate, it shall have until close of business on Wednesday, October 2, 2019, to file a submission.

SO ORDERED.

Dated: New York, New York
25 September 2019

VICTOR MARRERO
U.S.D.J.

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N.Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

CAREY R. DUNNE
GENERAL COUNSEL

BY HAND DELIVERY
Judge Victor Marrero
U.S. District Court Judge
Southern District of New York
500 Pearl Street, New York, N.Y.

September 26, 2019

Re: Donald J. Trump v. Cyrus R. Vance, Jr.
Case No. 1:19-cv-08694 (VM)

Dear Judge Marrero:

We represent the office of Cyrus R. Vance, Jr., District Attorney of New York County (the "Office"), a defendant in this matter.

Pursuant to the Court's order of September 25, 2019 (Dkt. # 25), and without prejudice to any right asserted by any party, we write to inform the Court that the parties have reached a temporary arrangement.

The Office agrees to forbear enforcement of Mazars USA LLP's ("Mazars") obligations to produce documents pursuant to the Mazars subpoena at issue in this litigation until 1:00 p.m. two business days after the Court rules on the pending motions to dismiss and for injunctive relief, or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner. In the interim, the parties agree that Mazars will resume gathering and preparing all documents responsive to the subpoena. The parties further agree that, subject to a contrary court order, Mazars will begin a rolling production of such documents immediately upon the expiration of this agreement, with Mazars' first production to be made by hand delivery at 4:00 p.m. on the day this agreement expires.

We are available at the Court's convenience should any questions arise concerning this undertaking.

Very truly yours,

Carey R. Dunne, *General Counsel*
Christopher Conroy
Solomon B. Shinerock
James H. Graham
Allen J. Vickey
Assistant District Attorneys
New York County District Attorney's Office

Agreed on September 26, 2019:

William Consovoy
Marc Mukasey
Alan Futerfas
Counsel of Record for the Plaintiff

Jerry D. Bernstein
Inbal Paz Garrity
Nicholas R. Tambone
Counsel of Record for Defendant Mazars USA, LLP

CC: all counsel of record (via email)

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the parties.

SO ORDERED.

9-26-19
DATE

VICTOR MARRERO, U.S.D.J.

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N.Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

CAREY R. DUNNE
GENERAL COUNSEL

October 3, 2019

BY HAND DELIVERY
Judge Victor Marrero
U.S. District Court Judge
Southern District of New York
500 Pearl Street, New York, N.Y.

Re: Donald J. Trump v. Cyrus R. Vance, Jr.
Case No. 1:19-cv-08694 (VM)

Dear Judge Marrero:

We write to respond briefly to the "Statement of Interest" filed by the United States Department of Justice ("DOJ") in this litigation late yesterday afternoon.

By way of its seemingly simple submission, the DOJ has elected to insert itself into this private lawsuit to support the Plaintiff's extravagant claim that, given his current position, he and all of his prior business associates and related companies are immune, not just from prosecution, but from any routine grand jury inquiry into transactions undertaken before he was a government employee. This DOJ position is all the more audacious in view of the fact that, until quite recently and for more than a year, *DOJ prosecutors in this very District* conducted a highly publicized grand jury investigation into some of the very same transactions and actors that have been reported to be at issue in this matter. For all the reasons articulated in our earlier brief (Dkt. 16), the Plaintiff's position is not and should not be the law. In particular, the DOJ submission ignores the reality underlying Plaintiff's lawsuit in three important ways:

First, while the DOJ claims there is no cognizable harm to the People of the State of New York from a stay that "maintain[s] the status quo" (Dkt. 32: at 10), the true exigency here stems from the fact that delaying enforcement of the subpoena will likely result in the expiration of the statutes of limitation that would apply to some of the transactions at issue in the grand jury investigation (Dkt. 16: at 19). Also of concern is the State's sovereign right to enforce its criminal laws free from federal interference.

Second, in contrast, the DOJ ignores the fact that there is no credible claim of irreparable harm to Plaintiff, should subpoena compliance resume. This is because a) the documents in question are to be produced by a third-party business, which would visit neither distraction nor burden on the Plaintiff whatsoever; b) there is no risk of publication of the materials the Plaintiff is so concerned about, given the statutory requirements of grand jury secrecy; and c) there is nothing inherently "privileged" or sacrosanct in the first place about a president's tax returns (especially returns that stem

from periods when he was in private business). The Plaintiff himself, before taking office, agreed to make such documents public,[1] and every prior president for the past forty years has done so without incident. (And, of course, the returns at issue have been filed *already* with at least two other governmental agencies: the federal tax authorities and those in the State of New York.) Plaintiff has not articulated any reason why a production of his tax returns, by a third-party and under the protection of grand jury secrecy, would create "irreparable harm" for his or any presidency.

Third, the DOJ submission ignores the settled law. As an initial matter, the DOJ relies on 42 U.S.C. § 1983 ("§ 1983") to posit the existence of subject matter jurisdiction and an exception to the Anti-Injunction Act (Dkt. 32: at 2). This reliance is misplaced. The Article II right asserted by the Plaintiff here is not cognizable under § 1983, because it is "'too vague and amorphous.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431–32 [1987]). Indeed, "the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce,' [and] is intended to benefit the putative plaintiff." *Golden State Transit Corp.*, 493 U.S. at 108 (internal citation omitted). The Plaintiff's claimed Article II right to "freedom from enforcement of the subpoena" (Dkt. 32: at 3) exists neither in the terms of Article II nor in case law interpreting that provision.[2]

Even if Plaintiff were to have a colorable claim under Article II and § 1983, this Court should still abstain under *Younger*. As an initial matter, the DOJ ignores the plain language of *Sprint*, which does not stand for the proposition that federal courts "sometimes" abstain from suits involving state criminal proceedings (Dkt. 32: at 2), but instead clearly reaffirmed the long-held principle that: "*Younger* exemplifies one class of cases in which federal-court abstention is **required**: When there is a parallel, pending state criminal proceeding, federal courts **must** refrain from enjoining the state prosecution." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (emphasis added). Here, there is clearly a pending state criminal proceeding that, as described above, is being irreparably harmed by Plaintiff's tactical requests for delay.

In addition, contrary to DOJ's contention (*see* Dkt. 32: at 5, 8 [citing *Moore v. Sims*, 442 U.S. 415 (1979)]), New York state proceedings do afford Plaintiff an adequate opportunity to raise any constitutional claims: while we firmly believe he would ultimately lose on the merits, Plaintiff can bring his § 1983 lawsuit in state court. *See, e.g., Haywood v. Drown*, 556 U.S. 729, 734-36 (2009). As the Supreme Court stated in *Haywood*, "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." 556 U.S. at 735. In short, although DOJ appears to presume that state courts cannot properly entertain Plaintiff's claims, that stands in stark contrast to the Supreme Court's repeated holding that "'state courts have inherent authority, and are thus presumptively competent, to

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[1] *See* Meet the Press, *Donald Trump: I will Release Tax Returns*, NBC News, Jan. 24, 2016, *available at* https://www.nbcnews.com/meet-the-press/video/donald-trump-i-will-release-tax-returns-607836227723.

[2] Even in a world where such a right existed under Article II (a position that even the DOJ does not explicitly embrace), it would be for the United States alone to assert it, because the violation would be against the Office of the President. It would not be enforceable by this Plaintiff acting in his individual capacity to prevent disclosure of records largely pre-dating his time in office and related to third-party business entities and individuals.

October 3, 2019

adjudicate claims arising under the laws of the United States.'" *Id.* at 735-36 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458-59 [1990]).

Notably, while the DOJ avoids taking any position on the ultimate merits and the Plaintiff's entitlement to the emergency relief he seeks, the DOJ nonetheless invites the Court to provide "interim relief" to "maintain the status quo" (Dkt. 32: at 10). This is a gently phrased invitation to ignore the clear standards applied in the Second Circuit for imposition of a preliminary injunction, and to permit Plaintiff to evade the consequence of his failure to meet those standards.

In short, the Plaintiff's only goal in this litigation, now supported by the DOJ itself, is to obtain as much delay as possible, through litigation, stays, and appeals. If delays are achieved, to the frustration of the New York state inquiry, the Plaintiff will win (as will the various individuals and companies at issue in the grand jury investigation), and the state interest will be irreparably harmed, even without an actual decision on the merits.

We reiterate our position that this matter should be dismissed pursuant to the settled law mandating abstention. Further, for all the reasons articulated in our brief (Dkt. 16: at 11-19), Plaintiff's motion for injunctive relief should be denied, including on the ultimate merits, which turn on the law and have been, at this point, fully briefed and argued.

Very truly yours,

Carey R. Dunne, *General Counsel*
Christopher Conroy
Solomon B. Shinerock
James H. Graham
Allen J. Vickey
Assistant District Attorneys
New York County District Attorney's Office

CC: all counsel of record (via email)

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by defendant.

SO ORDERED.

10-3-19
DATE

VICTOR MARRERO, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,

Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York, and MAZARS USA, LLP,

Defendants.

19 Civ. 8694 (VM)

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Donald J. Trump ("Plaintiff" or the "President"), filed this action seeking to enjoin enforcement of a grand jury subpoena (the "Mazars Subpoena") issued by Cyrus R. Vance, Jr., in his official capacity as the District Attorney of the County of New York (the "District Attorney"), to the accounting firm Mazars USA, LLP ("Mazars"). (See "Complaint," Dkt. No. 1; "Amended Complaint," Dkt. No. 27.)[1]

[1] The Court notes a measure of ambiguity regarding whether the President purports to bring this suit in his official capacity as President. The President never explicitly states that he does so, yet his arguments depend on his status as the sitting President. Whether privately retained, non-government attorneys accountable only to the President as an individual are entitled to invoke an immunity allegedly derived from the office of the Presidency, raises questions not addressed here. In any event, the Court finds resolution of this ambiguity unnecessary to its analysis.

INTRODUCTION

The President asserts an extraordinary claim in the dispute now before this Court. He contends that, in his view of the President's duties and functions and the allocation of governmental powers between the executive and the judicial branches under the United States Constitution, the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind. Consider the reach of the President's argument. As the Court reads it, presidential immunity would stretch to cover every phase of criminal proceedings, including investigations, grand jury proceedings and subpoenas, indictment, prosecution, arrest, trial, conviction, and incarceration. That constitutional protection presumably would encompass any conduct, at any time, in any forum, whether federal or state, and whether the President acted alone or in concert with other individuals.

Hence, according to this categorical doctrine as presented in this proceeding, the constitutional dimensions of the presidential shield from judicial process are virtually limitless: Until the President leaves office by expiration of his term, resignation, or removal through impeachment and conviction, his exemption from criminal proceedings would extend not only to matters arising from performance of the President's duties and functions in his

official capacity, but also to ones arising from his private affairs, financial transactions, and all other conduct undertaken by him as an ordinary citizen, both during and before his tenure in office.

Moreover, on this theory, the President's special dispensation from the criminal law's purview and judicial inquiry would embrace not only the behavior and activities of the President himself, but also extend derivatively so as to potentially immunize the misconduct of any other person, business affiliate, associate, or relative who may have collaborated with the President in committing purportedly unlawful acts and whose offenses ordinarily would warrant criminal investigation and prosecution of all involved.

In practice, the implications and actual effects of the President's categorical rule could be far-reaching. In some circumstances, by raising his protective shield, applicable statutes of limitations could run, barring further investigation and prosecution of serious criminal offenses, thus potentially enabling both the President and any accomplices to escape being brought to justice. Temporally, such immunity would operate to frustrate the administration of justice by insulating from criminal law scrutiny and judicial review, whether by federal or state courts, not only matters occurring during the President's tenure in office,

but potentially also records relating to transactions and illegal actions the President and others may have committed before he assumed the Presidency.

This Court cannot endorse such a categorical and limitless assertion of presidential immunity from judicial process as being countenanced by the nation's constitutional plan, especially in the light of the fundamental concerns over excessive arrogation of power that animated the Constitution's delicate structure and its calibrated balance of authority among the three branches of the national government, as well as between the federal and state authorities. Hence, the expansive notion of constitutional immunity invoked here to shield the President from judicial process would constitute an overreach of executive power.

The Court recognizes that subjecting the President to some aspects of criminal proceedings could impermissibly interfere with or even incapacitate the President's ability to discharge constitutional functions. Certainly lengthy imprisonment upon conviction would produce that result. But, as elaborated below, and contrary to the President's immunity claim as asserted here, that consequence would not necessarily follow every stage of every criminal proceeding. In particular that concern would not apply to the specific set of facts presented here to which the Court's holding is

limited: the President's compliance with a grand jury subpoena issued in the course of a state prosecutor's criminal investigation of conduct and transactions relating to third persons that occurred at least in part prior to the President assuming office, that may or may not have involved the President, but that at this phase of the proceedings demand review of records the President possesses or controls.

Alternatives exist that would recognize such distinctions and reconcile varying effects associated with a claim of presidential immunity in different criminal proceedings and at different stages of the process. The Court rejects the President's theory because, as articulated, such sweeping doctrine finds no support in the Constitution's text or history, or in germane guidance charted by rulings of the United States Supreme Court.

Questions and controversy over the scope of presidential immunity from judicial process, and unqualified invocations of such an exemption as advanced by some Presidents, are not new in the nation's constitutional experience. In fact, disputes concerning the doctrine arose during the Constitutional Convention in 1787 and the Framers' deliberations gave it some consideration. The underlying issues, however, were not explicitly articulated in the text of the charter that emerged from the Convention and thus have

remained largely unresolved. Consequently, the only thing truly absolute about presidential immunity from criminal process is the Constitution's silence about the existence and contours of such an exemption, a void the President seeks to fill by the expansive theory he proffers.

Nonetheless, the Founders and courts and legal commentators have repeatedly expressed one overarching concern about the breadth of the President's immunity from judicial process, a fear that served as a vital principle for subsequent court and scholarly review of the question: whether while in office the President stands above the law and absolutely beyond the reach of judicial process in any criminal proceeding. Shunning the concept of the inviolability of the person of the King of England and the bounds of the monarch's protective screen covering the Crown's actions from legal scrutiny, the Founders disclaimed any notion that the Constitution generally conferred similarly all-encompassing immunity upon the President. They gave expression to that rejection by recognizing the duality the President embodied as a unique figure, serving as head of the nation's government, but also existing as a private citizen.[2] As detailed below, the wisdom of that view has been

[2] See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office

tested before the courts on various occasions and has been roundly and consistently reaffirmed by the Supreme Court and lower courts.

In numerous rulings, the courts have circumscribed claims of presidential immunity in multiple ways. Specifically, they have held that such protection from judicial process does not extend to civil suits regarding private conduct that occurred before the President assumed office, to responding to subpoenas regarding the conduct of third-persons, and to providing testimony in court proceedings relating to private disputes involving third persons.

The notion of federal supremacy and presidential immunity from judicial process that the President here invokes, unqualified and boundless in its reach as described above, cuts across the grain of these constitutional precedents. It also ignores the analytic framework that the Supreme Court has counseled should guide review of presidential claims of immunity from judicial process. Of equal fundamental concern, the President's claim would tread

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at 20 n.14 (Sept. 24, 1973) ("The Framers of the Constitutions made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England . . . and that the President would not be above the law, nor have a single privilege annexed to his character.") (citing sources).

upon principles of federalism and comity that form essential components of our constitutional structure and the federal/state balance of governmental powers and functions. Bared to its core, the proposition the President advances reduces to the very notion that the Founders rejected at the inception of the Republic, and that the Supreme Court has since unequivocally repudiated: that a constitutional domain exists in this country in which not only the President, but, derivatively, relatives and persons and business entities associated with him in potentially unlawful private activities, are in fact above the law.

Because this Court finds aspects of such a doctrine repugnant to the nation's governmental structure and constitutional values, and for the reasons further stated below, it ABSTAINS from adjudicating this dispute and DISMISSES the President's suit. In the alternative, in the event on appeal abstention were found unwarranted under the circumstances presented here, the Court DENIES the President's motion for injunctive relief.

I. BACKGROUND

The Court begins by briefly recounting some facts that appear to be uncontested. The District Attorney is investigating conduct that occurred in New York State. As part of that investigation, the District Attorney served a

grand jury subpoena on the Trump Organization, LLC (the "Trump Organization") on August 1, 2019. That subpoena seeks various documents and records of the Trump Organization covering the period from June 2015 through September 2018. The Trump Organization proceeded to respond, at least in part, to that subpoena without court involvement. On August 29, 2019, the District Attorney served the Mazars Subpoena on Mazars. The Mazars Subpoena seeks various documents and records, including tax returns of the President and possibly third persons, covering the period from January 2011 through the present. In mid-September, counsel for the President informed the District Attorney that the President would seek to prevent enforcement of and compliance with the Mazars Subpoena as it related to the production of tax records. The President has now done so through this action.

On September 19, 2019, the President filed the Complaint in this action. On the same day, the President filed an emergency motion for a temporary restraining order and a preliminary injunction. (See "Pl.'s Motion," Dkt. No. 6; "Pl.'s Mem.," Dkt. No. 10-1[3]; "Consovoy Decl.," Dkt. No. 6-2.) Upon receipt of the President's motion and supporting

[3] Citations to the memorandum of law in support of the President's motion for injunctive relief herein shall be citations to Dkt. No. 10-1. The Court notes, however, that the memorandum of law at that docket entry is an amended version of the memorandum of law originally filed with the Court at Dkt. No. 6-3. (See Dkt. No. 10.)

documents, the Court directed the parties to confer on a briefing schedule and hearing date. Consistent with the Court's request, the parties submitted a joint letter with a proposed briefing schedule and hearing date, which the Court endorsed. (See Dkt. No. 4.) At the same time, the District Attorney agreed to stay enforcement of and compliance with the Mazars Subpoena until Wednesday, September 25, 2019 at 1:00 p.m. (See id.)

On September 23, 2019, the District Attorney filed a memorandum of law in opposition to the President's motion for injunctive relief and in favor of the District Attorney's motion to dismiss the Complaint. (See "September 23 Letter," Dkt. No. 15; "Def.'s Mem.," Dkt. No. 16; "Shinerock Decl.," Dkt. No. 17.)

On September 24, 2019, the President filed an opposition to the District Attorney's motion to dismiss and a reply in further support of the President's motion for injunctive relief. (See "Pl.'s Reply," Dkt. No. 22.)

On the same day, the United States filed a statement in support of the entry of a temporary restraining order. (See Dkt. No. 24.) Specifically, the United States supported the granting of a temporary restraining order in order to afford the United States additional time to consider whether to participate in this action. (See id.)

Also on the same day, the Court received a letter from Mazars, which indicated that Mazars "takes no position on the legal issues raised by Plaintiff." (See Dkt. No. 26.)

The Court heard oral arguments from the President and the District Attorney on September 25, 2019. (See Dkt. Minute Entry dated 9/25/2019; Transcript ("Tr.").) At the conclusion of oral argument, the Court extended the stay of enforcement of and compliance with the Mazars Subpoena to September 26, 2019 at 5:00 p.m.; ordered the parties to meet and confer regarding their concerns, and to inform the Court by September 26, 2019 at 4:00 p.m. whether they had agreed upon a process for proceeding; and granted the request of the United States for additional time to consider whether to participate in the action. (See Dkt. No. 25.)

By letter dated September 26, 2019, the District Attorney informed the Court that the parties had agreed that the District Attorney would forbear from enforcement of the Mazars Subpoena until 1:00 p.m. two business days after the Court's ruling (or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner) and Mazars would gather and prepare responsive documents in the interim. (See Dkt. No. 28.)

By letter dated September 30, 2019, the United States indicated its intent to file a submission. (See Dkt. No. 30.) On October 2, 2019, the United States filed a Statement of

Interest, urging the Court not to abstain, but to exercise jurisdiction over this dispute and, following additional briefing, to reach the merits of the President's claimed immunity. (See "Statement of Interest," Dkt. No. 32.) By letter dated October 3, 2019, the District Attorney responded to the Statement of Interest. (See "Def.'s Response," Dkt. No. 33.)

II. DISCUSSION

A. ANTI-INJUNCTION ACT

The Court begins its analysis by considering the District Attorney's argument that the Anti-Injunction Act, 28 U.S.C. Section 2283 (the "AIA"), forecloses the injunctive relief the President seeks. (See Def.'s Mem. 5-6, 8-9.) Dating to the 18th century and designed "to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court," Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630 (1977), the AIA provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The President has amended his complaint to clarify that he brings suit under 42 U.S.C. Section 1983 ("Section 1983") (see Amended

Complaint ¶ 8), meaning this case fits squarely into the first of the AIA's three exceptions.[4] See Mitchum v. Foster, 407 U.S. 225, 243 (1972) ("[Section] 1983 is an Act of Congress that falls within the 'expressly authorized' exception of [the AIA]."). Because Mitchum allows the Court to conclude that the AIA is no bar to injunctive relief here, the Court finds it unnecessary to reach the President's alternative arguments for the inapplicability of the AIA.

B. ABSTENTION

The District Attorney also submits that, under the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971), the Court must decline to exercise jurisdiction over the President's suit. (See Def.'s Mem. at 5-9.) Younger abstention is grounded in

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as "Our Federalism" . . . . What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State

[4] The District Attorney argues that the President's claimed immunity is "too vague and amorphous" to be cognizable under Section 1983. (Def.'s Response at 2 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)).) The Court shares the District Attorney's doubts on this score. However, because the Court declines to exercise jurisdiction on other grounds, it will assume without deciding that the claim is properly brought under Section 1983. See Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) (noting that federal courts may "choose among threshold grounds for disposing of a case without reaching the merits" (internal quotation marks omitted)).

> and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. at 44. Hence notwithstanding federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them," Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976), Younger requires federal courts to decline jurisdiction when a plaintiff seeks to enjoin one of the following three kinds of state proceedings: (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013) (quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989) (internal quotation marks omitted)).

If the federal plaintiff seeks to enjoin one of these three types of proceedings, a federal court may consider three additional conditions that further counsel in favor of Younger abstention, first laid out in Middlesex County Ethics Commission v. Garden State Bar Association. See 457 U.S. 423, 432 (1982). The "Middlesex conditions" are "(1) [whether] there is a pending state proceeding, (2) that implicates an

important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Falco v. Justices of the Matrimonial Parts of Supreme Ct. of Suffolk Cty., 805 F.3d 425, 427 (2d Cir. 2015).[5] Moreover, Younger also provides for an exception, pursuant to which a federal court may entertain a suit from which it must otherwise abstain, upon a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief" in federal court. 401 U.S. at 54.

For the reasons set forth below, the Court concludes that it must abstain under Younger.

1. Ongoing State Criminal Prosecution

Although the District Attorney views the Mazars Subpoena as part of an ongoing state criminal prosecution (see Def.'s Mem. at 6-7), the President disputes that contention. (See Pl.'s Reply at 10-11.) Hence the President denies the existence of either an "ongoing state criminal prosecution" under Sprint or a "pending state proceeding" per the first Middlesex condition. No party argues that there is a distinction between an "ongoing" proceeding and a "pending"

[5] Federal courts previously treated the Middlesex conditions as dispositive of the abstention inquiry, but it is unclear how much weight they should be given after the Sprint Court's clarification that they are merely "additional factors" appropriately considered in an abstention inquiry. See Falco, 805 F.3d at 427.

one, and the Court finds no such distinction in the law. The Court consequently considers these two terms identical for the purpose of its abstention analysis and concludes that the Mazars Subpoena does qualify as part of an ongoing state criminal prosecution for Younger purposes -- though not necessarily a prosecution of the President himself.

In the spirit of comity, the Court begins its analysis by observing that New York law considers the issuance of a grand jury subpoena to be a criminal proceeding. C.P.L. Section 1.20(18) defines a "[c]riminal proceeding" to cover "any proceeding which . . . occurs in a criminal court and is related to a prospective, pending or completed criminal action, . . . or involves a criminal investigation." C.P.L. Section 10.10(1) explains that the "'criminal courts' of [New York] state are comprised of the superior courts and the local criminal courts." Finally, C.P.L. Section 190.05 defines a grand jury as "a body . . . impaneled by a superior court and constituting a part of such court." Because the Mazars Subpoena relates to a criminal investigation and was issued by the grand jury, which constitutes a part of a criminal court, the Court finds as a matter of New York law that the Mazars Subpoena constitutes a criminal proceeding.

State law aside, the President correctly notes that the United States Courts of Appeals are divided on whether the

issuance of a grand jury or investigative subpoena constitutes a pending state proceeding for Younger purposes. Compare Monaghan v. Deakins, 798 F.2d 632, 637 (3d Cir. 1986)(holding that grand jury subpoenas do not constitute a pending state proceeding), vacated in part, 484 U.S. 193 (1988), with Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir. 1982) (abstaining because of "Virginia's interest in the unfettered operation of its grand jury system"), Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981), and Kingston v. Utah County, 161 F.3d 17, *4 (10th Cir. 1998) (Table). The United States Court of Appeals for the Second Circuit appears not to have yet ruled on the question.

The President asks the Court to agree with the Monaghan Court and hold that no ongoing criminal prosecution exists here because a state grand jury does not "adjudicate anything" and "exists only to charge that the defendant has violated the criminal law." (Pl.'s Reply at 11 (internal quotation marks omitted).) He also cites Google, Inc. v. Hood for the proposition that "Sprint undermined prior cases applying Younger abstention to grand-jury subpoenas." (Id. (citing 822 F.3d 212, 224 & n.7 (5th Cir. 2016)).)

However, the Sprint Court did not address what makes a criminal proceeding an ongoing prosecution. Instead, it reaffirmed that Younger applies only to criminal prosecutions

and state civil proceedings that are "akin to a criminal prosecution," and not to other civil proceedings. Sprint, 571 U.S. at 80. Here, there is no doubt that grand jury proceedings are criminal in nature. Moreover, the Hood Court explicitly observed that abstention was merited where Texas law reflected that a grand jury was "an arm of the court by which it is appointed." 822 F.3d at 223. As noted above, New York law similarly considers grand juries a part of the criminal court that impanels them. See also People v. Thompson, 8 N.E.3d 803, 810 (N.Y. 2014) ("[G]rand jurors are empowered to carry out numerous vital functions independently of the prosecutor, for they 'ha[ve] long been heralded as the shield of innocence . . . and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source.'") (quoting People v. Sayavong, 635 N.E.2d 1213, 1215 (N.Y. 1994) (internal quotation marks omitted)). The Second Circuit has further confirmed that "Grand Juries exist by virtue of the New York State Constitution and the Superior Court that impanels them; they are not arms or instruments of the District Attorney." United States v. Reed, 756 F.3d 184, 188 (2d Cir. 2014).

Although the Second Circuit has not explicitly addressed whether grand jury proceedings constitute an ongoing state prosecution under Younger, judges of this district have

"routinely applied Younger where investigatory subpoenas have been issued," even prior to a "full-fledged state prosecution" and outside of the criminal context. Mir v. Shah, No. 11 Civ. 5211, 2012 WL 6097770, at *3 (S.D.N.Y. Dec. 4, 2012); aff'd, 569 F. App'x 48, 50-51 (2d Cir. 2014) (affirming on basis that "abstention is still appropriate here under the Sprint framework"); see also Mirka United, Inc. v. Cuomo, No. 06 Civ. 14292, 2007 WL 4225487, at *4 (S.D.N.Y. Nov. 27, 2007) ("Numerous courts have held that investigatory proceedings that occur pre-indictment and that are an integral part of a state criminal prosecution may constitute 'ongoing state proceedings' for Younger purposes."); J. & W. Seligman & Co. Inc. v. Spitzer, No. 05 Civ. 7781, 2007 WL 2822208, at *5 (S.D.N.Y. Sept. 27, 2007) ("[T]he issuance of compulsory process, including subpoenas, in criminal cases, initiates an 'ongoing' proceeding for the purposes of Younger abstention."); Nick v. Abrams, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989) ("[C]ommon sense dictates that a criminal investigation is an integral part of a criminal proceeding. . . . Permitting the targets of state criminal investigations to challenge subpoenas . . . in federal court prior to their indictment or arrest, therefore, would do . . . much damage to principles of equity, comity, and federalism . . . ."). The Court declines to contradict over thirty years'

worth of settled and well-reasoned precedent of courts in this district and instead concludes that this case involves an ongoing state criminal prosecution.

2. The Second Middlesex Condition

The second Middlesex condition favors abstention if the pending state proceeding implicates an important state interest. See Falco, 805 F.3d at 427. The Court finds this condition satisfied. A state's interest in enforcement of its criminal laws undoubtedly qualifies as an important state interest, particularly considering that Younger itself concerned a challenge to state criminal proceedings. See Arizona v. Manypenny, 451 U.S. 232, 243 (1981); see generally Younger, 401 U.S. 37.

3. The Third Middlesex Condition

The third Middlesex condition favors abstention if "the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Falco, 805 F.3d at 427 (internal quotation marks omitted). "[A]ny uncertainties as to the scope of state proceedings or the availability of state remedies are generally resolved in favor of abstention. . . . [I]t is the plaintiff's burden to demonstrate that state remedies are inadequate." Spargo, 351 F.3d at 78. In this respect, federal courts may not "assume that state judges

will interpret ambiguities in state procedural law to bar presentation of federal claims." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987).

The President argues that state proceedings are inadequate because "under current New York law, it does not appear that the President could move to quash a subpoena he did not receive." (Pl.'s Reply at 9.) However, the Court's review of New York law suggests otherwise. A non-recipient can challenge a subpoena under certain circumstances. See Beach v. Oil Transfer Corp., 199 N.Y.S.2d 74, 76 (Sup. Ct. Kings Cty. 1960) ("In situations where witnesses served with subpoenas are not parties, nevertheless, upon a claim of privilege, the defendant being the party principally concerned by the adverse effect of the subpoenas served upon the witnesses and being the party whose rights are invaded by such process may apply to the court whose duty it is to enforce it, to set aside such process if it is invalid." (internal quotation marks omitted)); see also In re Roden, 106 N.Y.S.2d 345, 347-48 (Sup. Ct. N.Y. Cty. 1951) ("Any party affected by the process of the court or its mandate may apply to the court for its modification, vacatur, quashal or other relief he feels he is entitled to receive."); accord Colfin Bulls Funding B, LLC v. Ampton Invs., Inc., No. 151885/2015, 2018 WL 7051063, at *8 (Sup. Ct. N.Y. Cty. Nov. 26, 2018)

(quoting In re Roden for same proposition); People v. Grosunor, 439 N.Y.S.2d 243, 246 (Crim. Ct. Bronx Cty. 1981) (same).

The preceding decisions indicate that the President can challenge the Mazars Subpoena in a state forum on the basis of his asserted immunity. At the very least, they reflect an ambiguity in state law that the Court must resolve in favor of abstention.[6]

The President raises a closer question by arguing that, even if available, a state forum would "not be truly adequate" given that the federal and state governments are already in conflict. (Pl.'s Reply at 9.) As the President notes, some sources suggest that Younger is inapplicable to suits the federal government chooses to bring against state governments in federal court, on the theory that in those situations the federal-state conflict Younger seeks to preempt will occur even if the federal court abstains. See United States v. Morros, 268 F.3d 695, 707 (9th Cir. 2001); United States v.

[6] Even if the President could not challenge the Mazars Subpoena in state proceedings, it is unclear why he could not raise his constitutional arguments in a challenge to the subpoena served upon the Trump Organization (the "Trump Organization Subpoena"). As the President's counsel noted at oral argument, "there's not a document Mazars has that [the Trump Organization does not] have in [its] possession," Tr. 47:22-23. Counsel further stated that the Mazars Subpoena was prompted by the Trump Organization's refusal to comply with the Trump Organization Subpoena. Tr. 47:24-48:3. If the President views both subpoenas as attempts to criminally prosecute him, he could litigate his claimed immunity in a challenge to the Trump Organization Subpoena and incidentally render compliance with the Mazars Subpoena a moot point.

Composite State Bd. of Med. Examiners, 656 F.2d 131, 135-36 (5th Cir. 1981). The United States echoes these arguments, contending that the "principles of comity and federalism . . . lose their force when the federal government's own Chief Executive invokes federal constitutional law to challenge a state grand jury subpoena demanding his records." (Statement of Interest at 4.)

As an initial note, as pointed out above, the Court is not certain that attorneys privately retained by the person who is President can bring suit on behalf of the United States. Indeed, the Justice Department has filed a Statement of Interest on behalf of the United States pursuant to 28 U.S.C. Section 517, rather than formally intervening as a party, or explicitly stating that it is appearing on behalf of the President in connection with official presidential business implicating United States interests.

Even assuming that this action is brought by the federal government, however, the Supreme Court appears not to have addressed the impact of this consideration on Younger analysis, and there is precedent to the contrary. See Colorado River, 424 U.S. at 816 n.23 (declining to consider "when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction"); United States v. Ohio, 614 F.2d 101, 104 (6th Cir. 1979) ("Abstention

from exercise of federal jurisdiction is not improper simply because the United States is the party seeking a federal forum."); United States v. Oregon, No. 10 Civ. 528, 2011 WL 11426, at *5 (D. Or. Jan. 4, 2011) ("[T]he United States' role as plaintiff is not dispositive to this question. Comity principles can justify abstention even when the United States is the plaintiff."), aff'd, 503 F. App'x 525, 527 (9th Cir. 2013) (affirming abstention on basis that the distinction between the federal government and a private citizen "is not material given the [Supreme Court's] comity rationale" in Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010)).

The Court cannot agree that the President's filing of this action renders the principles of comity and federalism a nullity. While the Second Circuit does not appear to have directly addressed this "difficult question with regard to federal-state relations" in the Younger context, it has denied "that a stay [should be] automatically granted simply on the application of the United States." United States v. Certified Indus., Inc., 361 F.2d 857, 859 (2d Cir. 1966); see also United States v. Augspurger, 452 F. Supp. 659, 668 (W.D.N.Y. 1978) ("[T]he general rules of comity do apply even when the United States is the plaintiff.").

Instead, it is "necessary to inquire 'whether the granting of an injunction [is] proper in the circumstances of

this case.'" Certified Indus., 361 F.2d at 859 (quoting Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226 (1957)). This circumstantial test better accords with the vision of a federal court system "in which there is sensitivity to the legitimate interests of both State and National Governments . . . anxious though [the Court] may be to vindicate and protect federal rights and federal interests." Younger, 401 U.S. at 44. Automatically deferring to federal interests in suits brought by the federal government is as incompatible with our federalism as unthinkingly deferring to states' interests in state proceedings.[7]

Further, the President provides no compelling proof that New York courts would fail to adequately adjudicate his immunity claim, relying instead on the unsubstantiated allegation that he would risk "local prejudice." (Pl.'s Reply at 9 (quoting Clinton v. Jones, 520 U.S. 681, 691 (1997)).) Absent a much more compelling showing, the Court declines to conclude that New York courts will treat the President with

[7] The Court does not believe that the cases cited by the President compel a contrary conclusion. The Composite State Court specifically distinguished its set of facts from a case where, as here, "the state and federal governments are not in direct conflict" even though the federal government might have "an interest in the outcome of the action to the extent that a federal right is implicated." 656 F.2d at 136. And the Morros Court found that the federal-state conflict inhered where the two governments were locked in a contentious dispute spanning over ten years. See 268 F.3d at 708. By contrast, a direct or inherent conflict is not inevitable in this case, where the state grand jury has merely requested records pertaining to a broad set of facts and actors and may not ultimately target the President.

prejudice. Similarly, the United States misses the mark when it argues that "the state's interest in litigating such an unusual dispute in a state forum is minimal." (Statement of Interest at 8.) To the contrary, "[u]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." Manypenny, 451 U.S. at 243 (internal alterations, citations, and quotations omitted). The President's interest in adjudicating an alleged immunity from state criminal process in federal court, with respect to a state investigation that may or may not ultimately target the President, cannot outweigh the State interest without much stronger proof of State judicial inadequacy.[8]

[8] The United States also argues against abstention by analogizing to 28 U.S.C. Section 1442, which authorizes a federal officer to remove a state court action to federal court if she is directly sued "for or relating to any act under color of" her office. (Statement of Interest at 9.) But Mazars's duties and services with respect to the President's personal financial records do not appear to relate to any act taken under the color of the President's office, and no party argues otherwise. Nor has any party pointed to a federal defense that Mazars could bring, as might otherwise justify removal under the statute. See Watson v. Philip Morris Cos., 551 U.S. 142, 151 (2007); Isaacson v. Dow Chem. Co., 517 F.3d 129, 139 (2d Cir. 2008). Far from being directed to a federal officer for her federal acts, the Mazars Subpoena requests private records from a private third party. The Court declines to upend its broader Younger analysis on the basis of an inapposite hypothetical.

Even if the law regarding suits brought by the federal government is ultimately unclear, the Court cannot disregard the principles underlying Younger on this basis alone. And in any event, "it remains unclear how much weight [the Court] should afford [the Middlesex conditions] after Sprint." Falco, 805 F.3d at 427. Because the Court finds that there is an ongoing state criminal prosecution, an important state interest is implicated, and the state proceeding would afford the President at least a procedurally adequate opportunity for judicial review of his federal claims, the weight of the Court's analysis under Sprint and the Middlesex conditions requires abstention.[9]

4. The Bad Faith or Harassment Exception

Although the Court finds that a state criminal prosecution is ongoing and the Middlesex conditions further discourage the Court's exercise of jurisdiction, abstention may still be inappropriate if the President can demonstrate "bad faith, harassment, or any other unusual circumstance

[9] The Court is sensitive to the President's argument that abstention under these circumstances might embolden state-level investigation of future Presidents, especially by elected prosecutors in jurisdictions strongly opposed to a given incumbent. However, the Court cannot conclude that this argument merits the exercise of jurisdiction here, where the District Attorney has subpoenaed a third party in a broad investigation that may not ultimately target the President. If future criminal investigations by state prosecutors more clearly target a President on politicized grounds or invade on the prerogatives of the Presidency, then either such exceptional circumstances or evidence that the investigations lacked a good-faith basis could potentially warrant the exercise of federal court jurisdiction to consider such a challenge.

that would call for equitable relief." Younger, 401 U.S. at 54. "However, a plaintiff who seeks to head off Younger abstention bears the burden of establishing that one of the exceptions applies." Diamond "D" Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002). To invoke the bad faith exception, "the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome." Id. at 199 (internal quotation marks omitted). "[R]ecent cases concerning the bad faith exception have further emphasized that the subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of, this inquiry." Id.

The President argues that the Mazars Subpoena was issued in bad faith because it essentially copies two congressional subpoenas which cover subject matter allegedly exceeding the District Attorney's jurisdiction. The President also cites numerous statements by federal and state officials indicating their intent to investigate the President's finances and remove him from office. (See Amended Complaint ¶¶ 25–41.) The President further relies on Black Jack Distributors, Inc. v. Beame to claim that this evidence raises an inference that the District Attorney's "activities have a secondary motive" and are "going beyond good faith enforcement of the [criminal]

laws." (Pl.'s Reply at 10 (quoting 433 F. Supp. 1297, 1304-07 (S.D.N.Y. 1977)).)

The District Attorney acknowledges that the Mazars Subpoena is substantially identical to the congressional subpoenas, but he argues that the Mazars Subpoena remains appropriate because it would encompass documents relevant to the state's investigation and enable Mazars to produce those documents promptly, as Mazars had already begun collecting the same documents in order to respond to the congressional subpoenas. (Tr. 30:16-25.) The District Attorney adds that although the documents covered by the subpoenas may relate to matters of federal law, they nevertheless "certainly pertain to potential issues under state law," which would be the "exclusive focus" of his investigation. (Tr. 30:1-5.)

And although the statements cited in the President's complaint certainly reflect that a number of New York State elected officials may wish the President's tenure in office to end, those statements do not reveal the "subjective motive" of the District Attorney in initiating these particular proceedings -- particularly when the District Attorney made none of these statements himself, and they cannot otherwise be attributed to him. To hold otherwise and impute bad faith to the District Attorney on the basis of statements made by various legislators and the New York Attorney General would

be "incompatible with federal expression of 'a decent respect' for" the state authority's functions. Glatzer v. Barone, 614 F. Supp. 2d 450, 460 (S.D.N.Y. 2009).

This case is thus distinguishable from Black Jack Distributors, where the court's finding of bad faith relied on a police department's consistent and repeated use of arrest procedures that had been "long ago held invalid under New York law," pursuant to the head of the enforcement project's declaration that the department would "undertake activities knowing that they are illegal" and "despite all constitutional limitations . . . stop at nothing" to put the plaintiff out of business. 433 F. Supp. at 1306. The President has not shown that the District Attorney is acting with anywhere near the same level of disregard for the law at this point in the investigation.

Moreover, the President has not alleged that the District Attorney lacks any "reasonable expectation of obtaining a favorable outcome," Diamond "D" Constr. Corp., 282 F.3d at 199, in the criminal prosecution of which the Mazars Subpoena is part -- a proceeding which, after all, need not necessarily lead to an indictment of the President himself. Indeed, the Declaration of Solomon Shinerock reflects that the District Attorney's investigation relates at least in part to "'hush money' payments to Stephanie

Clifford and Karen McDougal, how those payments were reflected in the Trump Organization's books and records, and who was involved in determining how those payments would be reflected in the Trump Organization's books and records." (See Shinerock Decl. ¶ 9.)

The Declaration also reflects that a variety of investigations related to similar conduct are either ongoing or resolved, including a non-prosecution agreement between federal prosecutors and American Media, Inc. related to an investigation of the lawfulness of the "hush money" payments; the conviction of Michael D. Cohen for tax fraud, false statements, and campaign finance violations during the period he was counsel to the President; and investigations by multiple other New York regulatory authorities concerning alleged insurance and bank fraud by the Trump Organization and its officers. (See id. ¶ 17.) None of these investigations necessarily involve the President himself, and the President fails to show that the District Attorney could not reasonably expect to obtain a favorable outcome in a criminal investigation that is substantially related to the topics and targets listed above. Barring a stronger showing from the President, the Court declines to impute bad faith to the District Attorney in relation to these proceedings.

5. The Extraordinary Circumstances Exception

Even if bad faith and harassment do not apply, a district court that would otherwise abstain under Younger may hear the federal plaintiff's claims if the claimant can prove that extraordinary or unusual circumstances justify enjoining the state court proceeding. See Younger, 401 U.S. at 54. "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." Kugler v. Helfant, 421 U.S. 117, 124-25 (1975). The Second Circuit has construed Kugler and related Supreme Court precedent to require "(1) that there be no state remedy available to meaningfully, timely, and adequately remedy the alleged constitutional violation; and (2) that a finding be made that the litigant will suffer 'great and immediate' harm if the federal court does not intervene" for the exception to apply. Diamond "D" Const. Corp., 282 F.3d at 201.

As noted in Section II.B.3 supra, New York state courts appear to provide an at least procedurally adequate avenue for remedying the alleged constitutional violation at issue. While the Court is mindful of "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives," Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982),

the President's claims nevertheless fail to demonstrate an "extraordinarily pressing need for immediate federal equitable relief." Kugler, 421 U.S. at 125. As described further in Section II.C.3.i infra, the President fails to show irreparable harm. The double jeopardy cases that the President cites are likewise inapposite to support his proposition that a claim of Presidential immunity would be "irreparably lost if . . . not vindicated immediately." (Pl.'s Reply at 8.) The President has not been the subject of any of the criminal proceedings he lists as grounds showing irreparable harm; he has not been indicted, arrested, or imprisoned, or even been identified as a target of the District Attorney's investigation -- let alone been tried once before, as required in the double jeopardy context.

Though the President and the United States devote significant attention to the President's unique constitutional position, these arguments reflect the highly unusual factual underpinning of this case rather than the "extraordinarily pressing need for immediate federal equitable relief" demanded by Kugler. Far from requesting immediate relief, the United States asks that this Court schedule additional briefing on the merits of the President's

claims.[10] (See Statement of Interest at 10.) The President's claim that his absolute immunity defense must be "vindicated immediately" also runs counter to his counsel's representations at oral argument that the President is not currently "seeking a permanent resolution of this dispute" but is instead merely asking for "an orderly process that allows the serious constitutional questions to be adjudicated carefully and thoughtfully[,] that preserves the [P]resident's right to be heard and allows him a reasonable chance to appeal any adverse decision that might alter the status quo." (Tr. 11:4, 10-14.)

The President fails to show that New York courts would not afford him such an orderly process, and his claim to absolute immunity simply does not demonstrate "an extraordinarily pressing need for immediate federal equitable relief" where the District Attorney has not identified the President as a target of the state investigation, let alone actually indicted him. On the contrary, the President's prophecies that he will be indicted and denied due process in state proceedings are, at best, speculative and unripe. The Second Circuit has previously held that "[t]he exceptional

[10] The Court denies this request, as the Court fails to see how further briefing on the merits of the President's immunity arguments would add to the parties' already extensive treatment of the subject, including a lengthy oral argument.

circumstances exception does not apply [where] the likelihood of immediate harm is speculative." See Miller v. Sutton, 697 F. App'x 27, 28 (2d Cir. 2017). This Court now so holds.

For these reasons, the Court abstains from exercising jurisdiction over the President's suit.

C. PRESIDENTIAL IMMUNITY

Notwithstanding the Court's decision to abstain, and mindful of the complexities and uncharted ground that the Younger doctrine presents, the Court will proceed to examine the merits of the President's claimed immunity and articulate an alternative holding, so as to obviate a remand in the event on appeal the Second Circuit disagrees with the Court's abstention holding. For the reasons stated below, the Court would deny the motion of the President for a temporary restraining order and a preliminary injunction (collectively, "injunctive relief").

At the outset, the Court notes that the question it addresses in this Order is narrower than the one upon which the President urges the Court to focus. Based on the record before it, and as noted in the preceding section of the Court's decision, the Court finds no clear and convincing evidence that the President himself is the target -- or, at minimum, the sole target -- of the investigation by the District Attorney. Rather, the record before the Court

indicates that the District Attorney is investigating a set of facts, and a number of individuals and business entities, in relation to which conduct by the President, lawful or unlawful, may or may not be a part. Accordingly, the question before the Court narrows to whether the District Attorney may issue a grand jury subpoena to a third person or entity requiring production of personal and business records of the President and other persons and entities? The Court's answer to that question is yes.

1. Legal Standard

Temporary restraining orders and preliminary injunctions are among "the most drastic tools in the arsenal of judicial remedies." Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam). To obtain this extraordinary remedy,

> [a] party seeking a preliminary injunction must ordinarily establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest.

New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). Because it is well-recognized that the legal standards governing preliminary injunctions and temporary restraining

orders are the same, the Court addresses them together. See AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc., 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010).

On the second element, the President advocates for the standard requiring "sufficiently serious questions going to the merits." (Pl.'s Reply at 17-18.) The Court finds, however, that the proper test here is the "likelihood of success" standard. The grand jury issued its subpoena in the course of an investigation into violations of New York law; the President's motion is thus an attempt to "stay government action taken in the public interest pursuant to a statutory . . . scheme." Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995). It is of no consequence that the proposed injunction would not restrain the State's financial laws themselves: "As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the 'likelihood of success' standard." Id.; see also Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580-81 (2d Cir. 1989). Nevertheless, given the Court's holding on the other prongs of the preliminary injunction standard, the President would not prevail even under the different but no less stringent "sufficiently serious questions" analysis.

Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

2. Parties' Arguments

The President advances two fundamental reasons for why he is entitled to injunctive relief. First, he argues that he will suffer an irreparable harm in the absence of injunctive relief, because "there will be no way to unring the bell once Mazars complies with the District Attorney's subpoena." (Pl.'s Mem. at 3.) Second, the President argues that he has demonstrated a likelihood of success on the merits, because, according to the President, it is clear that "[n]o State can criminally investigate, prosecute, or indict a President while he is in office." (Id.)

The District Attorney counters that the President's motion for injunctive relief should be denied, because the President has failed to carry his burden of showing entitlement to the requested relief. The District Attorney primarily maintains that the President has failed to demonstrate that he will suffer irreparable harm in the absence of injunctive relief for three reasons. First, the District Attorney contends that compliance with the Mazars Subpoena could be "undone" if the Court were to find the Mazars Subpoena to be invalid and unenforceable. (Def.'s Mem. at 12-13.) Second, the District Attorney notes that both his

office and the grand jury are obligated to maintain confidential any documents produced in response to the Mazars Subpoena. (See id. at 13.) Third, the District Attorney argues that no irreparable harm will ensue "if it becomes public that there is an ongoing criminal investigation that includes requests from third-parties about business transactions that relate to the President," in part because other entities have already been investigating conduct related to the President and those investigations have been public. (Id. at 13-14.)

The District Attorney also argues that the President has failed to demonstrate a likelihood of success on the merits. According to the District Attorney, there exists no law supporting a presidential immunity as expansive as the one claimed by the President in this action. (See id. at 15.) Finally, the District Attorney argues that the balance of equities and public interest both weigh in favor of denying the requested injunctive relief, because there is a public interest in having the grand jury investigation at issue proceed expeditiously. (See id. at 19.)

3. Analysis

The Court is not persuaded that the immunity claimed by the President in this action is so expansive as to encompass enforcement of and compliance with the Mazars Subpoena. As such, the President has not satisfied his burden of showing

entitlement to the "extraordinary and drastic remedy" of injunctive relief. Grand River Enter., 481 F.3d at 66. The Court turns to each element of the preliminary injunction standard in turn.

i. Irreparable Harm

The first element is irreparable harm, which is "an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.'" Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011) (quoting Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27, 37 (2d Cir. 1995)). This high standard reflects courts' "traditional reluctance to issue mandatory injunctions." North Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 38 n.8 (2d Cir. 2018) (quoting Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 441 n.3 (2d Cir. 1977)).

The Court finds that enforcement of and compliance with the Mazars Subpoena would not cause irreparable harm to the President. The President urges the Court to find otherwise on the basis that public disclosure of his personal records would cause irreparable harm, first, to the confidentiality of the President's tax and financial records and, second, to the President's opportunity for judicial review of his claims in this action.

The Court is not persuaded that disclosure of the President's financial records to the office of the District Attorney and the grand jury would cause the President irreparable harm. The President relies on a number of cases to support his argument that mere disclosure -- without more -- of the documents requested by the Mazars Subpoena would cause irreparable harm, but none of those cases relate to ongoing criminal investigations, let alone to the disclosure of documents and records to a grand jury bound by law and sworn official oath to keep such documents and records confidential. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop, 839 F. Supp. 68 (D. Me. 1993) (disclosure of plaintiff's business records to competitor by a former employee); Providence Journal Co. v. Fed. Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979) (disclosure of FBI documents to plaintiff); PepsiCo, Inc. v. Redmond, No. 94 Civ. 6838, 1996 WL 3965 (N.D. Ill. Jan. 2, 1996) (disclosure of plaintiff's trade secrets or confidential information to competitor defendant); Metro. Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976) (disclosure -- to a chapter of the National Organization for Women -- of certain forms and plans submitted by insurance companies to federal offices); Airbnb, Inc. v. City of New York, No. 18 Civ. 7712, 2019 WL 91990

(S.D.N.Y. Jan. 3, 2019) (disclosure of data regarding businesses' customers to Mayor's Office).

The Court agrees with the District Attorney that the grand jury is a "constitutional fixture." United States v. Williams, 504 U.S. 36, 47 (1992). As such, the Court finds that disclosure to a grand jury is different from disclosure to other persons or entities like those identified in the cases cited by the President. And because a grand jury is under a legal obligation to keep the confidentiality of its records, the Court finds that no irreparable harm will ensue from disclosure to it of the President's records sought here. See, e.g., People v. Fetcho, 698 N.E.2d 935, 938 (N.Y. 1998) ("[S]ecrecy has been an integral feature of Grand Jury proceedings since well before the founding of our Nation. . . . The reasons for this venerable and important policy include preserving the reputations of those being investigated by and appearing before a Grand Jury, safeguarding the independence of the Grand Jury, preventing the flight of the accused and encouraging free disclosure of information by witnesses.") (internal citation and quotation marks omitted); People v. Bonelli, 945 N.Y.S.2d 539, 541 (N.Y. Sup. Ct. 2012) ("Grand Jury secrecy is of paramount public interest and courts may not disclose these materials lightly." (internal quotation marks omitted)).

Further, as explained in Section II.B.3 supra, the Court finds that a state forum exists for judicial review of the President's claim.

ii. Likelihood of Success on the Merits

Even if the President had made a sufficient showing that enforcement of the Mazars Subpoena and the President's compliance with it would cause the President irreparable harm -- and, to be clear, the Court finds it would not -- the Court would nonetheless deny the President's motion for injunctive relief because the President has failed to demonstrate a likelihood of success on the merits.

The Court disagrees with the President's position that a third person or entity cannot be subpoenaed requesting documents related to an investigation concerning potentially unlawful transactions and conduct of third parties in which records possessed or controlled by the sitting President may be critical to establish the guilt or innocence of such third parties, or of the President. The Court also rejects the President's contention that the Constitution, the historical record, and the relevant case law support such a presidential claim.

As a threshold matter, the Court underscores several vital points. First, the President recognizes that the precise constitutional question this action presents -- the

core boundaries of the President's immunity from criminal process -- has not been presented squarely in any judicial forum, and thus has never been definitively resolved. (See Amended Complaint ¶ 10 ("no court has had to squarely consider the question" of whether a President can be subject to criminal process while in office).)

The President urges the Court to conclude that the powers vested in the President by Article II and the Supremacy Clause necessarily imply that the President cannot "be investigated, indicted, or otherwise subjected to criminal process" while in office (Pl.'s Mem. at 9), and that "criminal process" encompasses investigations of third persons concerning matters that may relate to conduct or transactions of third persons, or of the President. (Id. at 8, 13.) As the Court reads the proposition, the President's definition of "criminal process" is all-encompassing; it would extend a blanket presidential and derivative immunity to all stages of federal and state criminal law enforcement proceedings and judicial process: investigations, grand jury proceedings, indictment, arrest, prosecution, trial, conviction, and punishment by incarceration and perhaps even by fine. The Court will proceed to canvas the various relevant authorities to assess that proposition.

a. Department of Justice Memoranda

As authority for the absolute immunity doctrine he proclaims, the President points to and rests substantially upon two documents issued by the Justice Department's Office of Legal Counsel ("OLC"). The first memorandum appeared in 2000. See Memorandum Opinion for the Attorney General, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000) (the "Moss Memo"). The Moss Memo in turn contains a review and reaffirmation of an OLC memorandum from 1973. See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) (the "Dixon Memo"). In addition, the President relies upon a 1973 brief filed by Solicitor General Robert Bork in the United States District Court for the District of Maryland in connection with a federal grand jury proceeding regarding misconduct of Vice President Spiro Agnew.[11] See Memorandum for the United States Concerning the

[11] The Moss Memo reexamined and updated the Dixon and Bork Memos and essentially reaffirmed their conclusion that indictment and prosecution of a President while in office would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." See Moss Memo at 223.

Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States, No. 73 Civ. 965 (D. Md. 1973) (the "Bork Memo"). The Dixon, Moss, and Bork Memos are here referred to collectively as the "DOJ Memos." The gist of these documents is that a sitting President is categorically immune from criminal investigation, indictment, and prosecution.

The Court is not persuaded that it should accord the weight and legal force the President ascribes to the DOJ Memos, or accept as controlling the far-reaching proposition for which they are cited in the context of the controversy at hand. As a point of departure, the Court notes that many statements of the principle that "a sitting President cannot be indicted or criminally prosecuted" typically cite to the DOJ Memos as sole authority for that proposition. Accordingly, the theory has gained a certain degree of axiomatic acceptance, and the DOJ Memos which propagate it have assumed substantial legal force as if their conclusion were inscribed on constitutional tablets so-etched by the Supreme Court. The Court considers such popular currency for the categorical concept and its legal support as not warranted.

Because the arguments the President advances are so substantially grounded on the supposed constitutional doctrine and rationale the DOJ Memos present, a close review of the DOJ Memos is called for. On such assessment, the Court rejects the DOJ Memos' position. It concludes that better-calibrated alternatives to absolute presidential immunity exist yielding a more appropriate balance between, on the one hand, the burdens that subjecting the President to criminal proceedings would impose on his ability to perform constitutional duties, and, on the other, the need to promote the courts' legitimate interests and functions in ensuring effective law enforcement attendant to the proper and fair administration of justice.

The heavy reliance the President places on the DOJ Memos is misplaced for several reasons. First, though they contain an exhaustive and learned consideration of the constitutional questions presented here, the DOJ Memos do not constitute authoritative judicial interpretation of the Constitution concerning those issues. In fact, as the DOJ Memos themselves also concede, the precise presidential immunity questions this litigation raises have never been squarely presented or fully addressed by the Supreme Court. See Moss Memo at 237; Dixon Memo at 21. Nonetheless, as elaborated in Section II.C.3.ii.c infra, insofar as the Supreme Court has examined

some of the relevant presidential privileges and immunities issues as applied in other contexts, the case law does not support the President's and the DOJ Memos' absolute immunity argument to its full extremity and ramifications.

Second, the DOJ Memos address solely the amenability of the President to federal criminal process. Hence, because state law enforcement proceedings were not directly at issue in the matters that prompted the memos, as they are here, the DOJ Memos do not address the unique concerns implicated by a blanket assertion of presidential immunity from state criminal law enforcement and judicial proceedings.[12] That gap and its significant distinction would include due recognition of the principles of federalism and comity, and the proper balance between the legitimate interests of federal and state authorities in the administration of justice, as discussed above in the section addressing Younger abstention. See Clinton v. Jones, 520 U.S. 681, 691 (1997) (noting that in the context of state law enforcement proceedings, invocation of presidential privilege could implicate "federalism and comity concerns").

[12] The Moss Memo acknowledged that its analysis, and that of the Dixon Memo, focused solely on federal rather than state prosecution of a President while in office, and therefore did not consider "any additional concerns that may be implicated by state criminal prosecution of a sitting President." Moss Memo at 223 n.2.

State criminal law enforcement proceedings and judicial process, moreover, do not implicate one of the DOJ Memos' rationales justifying broad presidential immunity from federal criminal process: that by virtue of the President's functions as Chief Executive, giving him power over prosecution, invocation of privilege, and pardons in federal criminal proceedings against the President would be inappropriate and ineffective, as such process would turn the President into prosecutor and defendant at the same time.[13] See Dixon Memo at 26.

Third, the Memos' analyses are flawed by ambiguities (if not outright conflicts) on an essential point: the scope of presidential immunity as presented in the DOJ Memos and asserted here by the President's claim. For instance, the Dixon Memo refers to the immunity of a sitting President from "criminal proceedings," without explicitly defining what "proceedings" the rule would encompass. See, e.g., Dixon Memo at 18. The Bork Memo, again without further elaboration, discusses the President's immunity from federal "criminal process" while in office. See Bork Memo at 3. Whether there

[13] Of course, as the Watergate scandal and more recent events confirm, there are practical and legal constraints over a president's power to interfere with a federal law enforcement investigation of himself or his Office, without risking serious charges of obstruction of justice.

is a difference between "criminal proceedings" and "criminal process" is a basic open question.

The Moss Memo, rather than addressing this uncertainty, compounds it by introducing a third expression of the principle that, though not further defined, clearly suggests a narrower scope of presidential immunity than that expressed in the Dixon and Bork Memos. In particular, throughout, the Moss Memo's analysis refers to the exemption as not subjecting a President while in office to "indictment and criminal prosecution." See, e.g., Moss Memo at 222. That articulation invites inquiry as to whether the rule it states would not apply to pre-indictment stages of criminal process such as investigations and grand jury proceedings, including responding to subpoenas.

On this crucial point the DOJ Memos may be at odds with one another. The specific circumstance that impelled the Dixon and Bork Memos was a grand jury investigation of Vice President Agnew, in which he objected to responding to a grand jury subpoena and argued that the Constitution prohibited investigation and indictment of an incumbent Vice President, and consequently that he could not be compelled to answer a subpoena. The Dixon and Bork Memos rejected that contention and concluded that the Vice President was not entitled to claim immunity from criminal process and prosecution. But

both Memos went further and indicated that such a broad exemption would extend to the sitting President. Implicitly, therefore, as suggested by the context, the Dixon and Bork Memos would expand the scope of their reference to "criminal proceedings" and "criminal process" to cover presidential immunity from all pre-indictment phases of criminal law prosecutions, presumably including exemption from investigations, grand jury proceedings, and subpoenas.

The Moss Memo, however, by framing its analysis of the scope of the President's immunity from criminal law enforcement by reference specifically to "indictment or criminal prosecution," could be read to suggest that the exemption would not encompass investigations and grand jury proceedings, including responding to subpoenas. In fact, the Moss Memo expressly distinguishes the other two memos on this point.[14] Addressing concern over the potential prejudicial loss of evidence that could occur during a period of presidential immunity prior to indictment, the Moss Memo states that "[a] grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." Moss Memo at 257 n.36. Moreover, the Moss Memo disavows an

[14] See Moss Memo at 232 n.10 (noting that unlike the Dixon Memo, the Bork Memo "did not specifically distinguish between indictment and other phases of the 'criminal process'").

interpretation of the Dixon and Bork Memos' analyses as positing "a broad contention that the President is immune from all judicial process while in office." Moss Memo at 239 n.15. It further notes that the Dixon Memo "specifically cast doubt upon such a contention" and explains that a broader statement by Attorney General Stanbury in 1867 "is presumably limited to the power of the courts to review official action of the President." Id. (emphasis added).

The Moss Memo thus stepped back from the extreme position advanced by Vice President Agnew, and that is repeated here by the President's argument, that immunity extends to all criminal investigations and grand jury proceedings, including responding to subpoenas. In fact, as the Moss Memo acknowledges, such a view has been rejected by longstanding case law. Supporting this observation, the Moss Memo quotes another OLC Memorandum, dating to 1988, which declared that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." Id. at 253 n.29 (quoting Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Constitutional

Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution at 2 (Oct. 17, 1988)); see also United States v. Burr, 25 Fed. Cas. 30, No. 14,692 (C.C.D. Va. 1807) (Chief Justice Marshall noting that "[t]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to [] precede their being issued"); Clinton, 520 U.S. at 704-05 ("It is also settled that the President is subject to judicial process in appropriate circumstances. . . . We unequivocally and emphatically endorsed [Chief Justice] Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. . . . As we explained, 'neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute unqualified Presidential privilege of immunity from judicial process under all circumstances.'" (quoting United States v. Nixon, 418 U.S. 683, 706 (1974) (internal citations omitted)); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Presidential Amenability to Judicial Subpoena (June 25, 1973) (noting the

view expressed by Chief Justice Marshall in Burr that while the President's duties may create difficulties complying with a subpoena, this "was a matter to be shown upon the return of the subpoena as a justification for not obeying the process; it did not constitute a reason for not issuing it").

The uncertainties and inconsistencies these various statements manifest about an essential question of constitutional interpretation suggest that the DOJ Memos' position concerning presidential immunity from criminal law enforcement and judicial process cannot serve as compelling authority for the President's claim of absolute immunity, at least insofar as the argument would extend to pre-indictment investigations and grand jury proceedings such as those at issue in this case.

Finally, the DOJ Memos lose persuasive force because their analysis and conclusions derive not from a real case presenting real facts, but instead from an unqualified abstract doctrine conclusorily asserting a generalized principle, specifically the proposition that while in office the President is not subject to criminal process. Because the constitutional text and history on point are scant and inconclusive, the DOJ Memos construct a doctrinal foundation and structure to support a presidential immunity theory that substantially relies on suppositions, practicalities, and

public policy, as well as on conjurings of remote prospects and hyperbolic horrors about the consequences to the Presidency and the nation as a whole that would befall under any model of presidential immunity other than the categorical rule on which the DOJ Memos and the President's claim ultimately rest.

The shortcomings of formulating a categorical rule from abstract principles may be highlighted by various concrete examples demonstrating that other plausible alternatives exist that would not produce the dire consequences the DOJ Memos portray absent the absolute presidential exemption they propound. The indictment stage of criminal process presents such an illustration, raising fundamental questions, reasonable doubts, and feasible grounds for making exceptions to an unqualified presidential immunity doctrine. The Dixon Memo itself acknowledges as "arguable" the possibility of an alternative approach that would not implicate the concerns about the burdens and interferences with the President's ability to carry out official duties that are advanced to justify a categorical immunity rule: Permit the indictment of a sitting President but defer further prosecution until he or she leaves office. See Dixon Memo at 31. The Dixon Memo concludes that "[f]rom the standpoint of minimizing direct interruption of official duties . . . this procedure might be

a course to be considered." Id. at 29. Nonetheless, the Dixon Memo rejects that alternative, declaring without further analysis or support that an indictment pending while the President remains in office would harm the Presidency virtually as much as an actual conviction. Id.

Perhaps the most substantial flaw in the DOJ Memos' case in favor of a categorical presidential immunity rule extending to all stages of criminal process is manifested in their expressions of absolutism that upon close parsing and deeper probing does not bear out. On this point, the DOJ Memos engage in rhetorical flair -- also embraced by the President's arguments -- that not only overstates their point, but does not consider the possibility of substantive distinctions which could reasonably address concerns about the burdens and intrusions that criminal proceedings against a sitting President could entail, and thus could support a practical alternative to a regime of absolute presidential immunity.

The thrust of the DOJ Memos' argument is that a doctrine of complete immunity of the President from criminal proceedings while in office can be justified by the consideration that subjecting the President to the jurisdiction of the courts would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions

and thus would be inconsistent with the constitutional structure." Moss Memo at 223.

In support of that peremptory claim, the DOJ Memos -- and the President -- describe various physical and non-physical interferences associated with defending criminal proceedings that they contend could impair the ability of a President to govern, even possibly amounting to a complete functional disabling of the President. In particular, the DOJ Memos cite mental distraction, the effect of public stigma, loss of stature and respect, the need to assist in the preparation of a defense, the time commitment demanded by personal appearance at a trial, and the incapacitation effected by an arrest or imprisonment if convicted. See, e.g., Moss Memo at 249-54. Summarizing these potential impediments, the Dixon Memo concludes:

> [T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. . . . [T]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Dixon Memo at 30. To a similar effect, the Moss Memo declares that

> the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a

> grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function.[15]

Moss Memo at 236.

A major problem with constructing a categorical rule founded upon hypothesizing and extrapolating from an abstract general proposition disembodied from an actual set of facts, is that the entire theoretical structure could collapse when it encounters a real-world application that shakes the underpinnings of the unqualified doctrine. To propound as a blanket constitutional principle that a President cannot be subjected to criminal process presupposes a faulty premise. Implicit in that pronouncement is the assumption that every crime -- and every stage of every criminal proceeding, at any time and forum, whether involving only one or many other offenders -- is just like every other instance of its kind.

The absolute proposition also presumes uniformity of consequences: that but for the application of absolute presidential immunity every one of these circumstances would give rise to every one of the alarming outcomes conjured by

[15] The Court notes that in this statement the Moss Memo essentially implies that the scope of presidential immunity it urges would extend to grand jury proceedings, not only to "indictment and criminal prosecution," as expressed throughout the rest of the memo. The remark apparently contradicts expressions elsewhere in the memo suggesting that a sitting President could be the subject of grand jury investigations. See, e.g., supra pages 50-51.

the DOJ Memos to justify unqualified presidential protection from any form of criminal process. But on deeper scrutiny of the rationale for the categorical doctrine, and by constructing alternatives that eliminate or substantially mitigate even the most extreme fears conjured, the assumptions underlying the categorical rule may prove both unjustified and wrong.

In fact, not every criminal proceeding to which a President may be subjected would raise the grim specters the DOJ Memos portray as incapacitation of the President, as impeding him from discharging official duties, or as hamstringing "the operation of the whole governmental apparatus." Dixon Memo at 30. To be sure, some crimes and some criminal proceedings may involve very serious offenses that undisputably may demand the President's full personal time, energy, and attention to prepare a defense, and that consequently could justify recognition of broader immunity from criminal process in the particular case.

Nonetheless, not every criminal offense falls into that exceptional category. Some crimes may require months or even years to resolve, while others conceivably could be disposed of in a matter of days, even hours. To be specific, perhaps a charge of murder and imprisonment upon conviction would present extraordinary circumstances raising the burdens and

interferences the DOJ Memos describe and thus justify broad immunity. But a charge of failing to pay state taxes, or of driving while intoxicated, may not necessarily implicate such concerns. Similarly, responding to a subpoena relating to the conduct of a third party, as is the case here, would likely not create the catastrophic intrusions on the President's personal time and energy, or impair his ability to discharge official functions, or threaten the "dramatic destabilization" of the nation's government that the DOJ Memos and the President depict. See Dixon Memo at 29 (acknowledging that "[t]he physical interference consideration . . . would not be quite as serious regarding minor offenses leading to a short trial and a fine," and that "Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses"). See also, Moss Memo at 254 (acknowledging that "[i]t is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions.").

As regards public stigma, vilification, and loss of stature associated with criminal prosecutions, again some criminal offenses undoubtedly could engender such

consequences and would warrant significant weight in assessing a claim of immunity from criminal process, but others would not. Indeed, some civil wrongs, such as sexual harassment, could arouse much greater public opprobrium and cause more severe mental anguish and personal distraction than, for example, criminal possession of a marijuana joint. Moreover, as Paula Jones's lawsuit against President Clinton illustrated, civil charges of sexual misconduct filed against a sitting President could entail an extensive call on a President's time and energy, and potentially interfere with performance of official duties,[16] perhaps to a greater degree than some criminal charges that could be more readily resolved. And not every crime and not every conviction necessarily results in a sentence requiring imprisonment.

In a similar vein, a criminal accusation involving the President alone cannot be considered in the same light as one entailing unlawful actions committed by other persons that in some way may also implicate potential criminal conduct by the President. This circumstance presents unique implications that demand recognizing and making finer distinctions. A grand jury investigation of serious unlawful acts committed

[16] See Clinton, 520 U.S. at 701-02 ("As a factual matter, [President Clinton] contends that this particular case -- as well as the potential additional litigation that an affirmance . . . might spawn -- may impose an unacceptable burden on the President's time and energy and thereby impair the effective performance of his office.").

by third persons may turn up evidence incriminating the sitting President. It would create significant issues impairing the fair and effective administration of justice if the proceedings had to be suspended or abandoned because the President, invoking absolute immunity from all criminal investigations and grand jury proceedings, refused to provide critical evidence he may possess that could, either during the investigation or at later proceedings, convict or exonerate any of the co-conspirators. In that instance, the President's claim of absolute immunity conceivably could enable the guilty to go free, and deprive the innocent of an opportunity to resolve serious accusations in a court of law.

The running of a statute of limitations in favor of the President or third persons during the period of immunity presents additional complexities and exceptional circumstances in these situations, similarly raising the prospect of frustrating the proper administration of justice.

A hypothetical combining all of these difficulties may illustrate how a real and compelling set of facts could undermine a blanket invocation of presidential immunity from all criminal process. Suppose that during the course of a criminal investigation of numerous third persons engaged in very serious crimes, some of the targets being high-ranking government officials, substantial evidence is uncovered

indicating that the President was closely involved with those other persons in committing the offenses under investigation. The accusations come to light not long before the President's term is about to expire, leaving no time for the House of Representatives to present articles of impeachment, nor for the Senate to conduct a trial. But the applicable statute of limitations is also about to expire before the President leaves office.

On these facts, no persuasive argument could be made that an indictment of the President while in office, along with the co-conspirators -- thereby tolling the statute of limitations -- would present the severe burdens and interferences with the discharge of the President's duties that the DOJ Memos interpose. Balanced against the prospect of a number of powerful individuals going free and escaping punishment for serious crimes by virtue of the President asserting absolute immunity from criminal process, an alternative that would allow the indictment and prosecution to proceed under these circumstances may weigh against recognizing a categorical claim of presidential immunity.

The Dixon Memo acknowledges the special difficulties that criminal proceedings involving co-conspirators and statute of limitations problems present. See Dixon Memo at 29, 32, 41. In response, the Dixon Memo dismisses such

concerns as not sufficient to overcome the argument in favor of the President's absolute immunity. See id. On that point, the Dixon Memo remarks: "In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability." Id. at 32. But failure to do full and fair justice in any case should not be shrugged off as mere collateral damage caused by a claim of presidential privilege or immunity. If in fact criminal justice falls to an assertion of immunity, that verdict should be an absolutely last resort. It should be justified by exacting reasons of momentous public interest such as national security, and be reviewable by a court of law. Above all, its effect should not be to shield the President from all legal process, especially in circumstances where it may appear that a claim of generalized immunity is invoked more on personal than on official grounds, and work to place the President above the law. See Nixon, 418 U.S. at 706 (holding that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets," a generalized interest in protecting the confidentiality of presidential communications in the performance of the President's duties must yield to the adverse effects of such a privilege on the fair administration of justice). As the Nixon Court declared under pertinent

circumstances, "[t]he impediment that an absolute unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." Id. at 707; see also Clinton, 520 U.S. at 708. Here, this Court is not persuaded that the President has met this rigorous standard.

b. Constitutional Text and History

The Court finds that the structure of the Constitution, the historical record, and the relevant case law support its conclusion that, except in circumstances involving military, diplomatic, or national security issues, a county prosecutor acts within his or her authority -- at the very least -- when issuing a subpoena to a third party even though that subpoena relates to purportedly unlawful conduct or transactions involving third parties that may also implicate the sitting President. No other conclusion squares with the fundamental notion, embodied in those sources, that the President is not above the law.

Turning first to the text of the Constitution and the historical record, the Court concludes that neither the Constitution nor the history surrounding the founding support as broad an interpretation of presidential immunity as the one now espoused by the President. As the Supreme Court did

in Clinton, this Court notes that the historical record does not conclusively answer the question presented to the Court:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side . . . . They largely cancel each other.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952).

c. Supreme Court Guidance

Turning to the opinions issued by the Supreme Court, the Court finds that they support this Court's conclusions in this action. The Supreme Court has twice recognized that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." Clinton, 520 U.S. at 705 (quoting Fitzgerald, 457 U.S. at 753-54). "[I]t is also settled that the President is subject to judicial process in appropriate circumstances." Id. at 703.

The narrower part of the judicial process that is at issue in this action -- i.e., responding to a subpoena -- has similarly been addressed by the Supreme Court. That Court squarely upheld the view first espoused by Chief Justice Marshall, who presided over the trial for treason of Vice

President Aaron Burr while in office, that "a subpoena duces tecum could be directed to the President." Id. at 703-04; accord Nixon, 418 U.S. at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."); see also Nixon v. Sirica, 487 F.2d 700, 709-10 (D.C. Cir. 1973) ("The clear implication is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance.") (en banc) (per curiam).

And at least one President (Richard M. Nixon) has himself conceded that he, as President, was required to produce documents in response to a judicial subpoena: "He concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so." Sirica, 487 F.2d at 713. If a subpoena may be directed to the President, it follows that a subpoena potentially implicating private conduct, records, or transactions of third persons and the President may lawfully be directed to a third-party.

The Court cannot square a vision of presidential immunity that would place the President above the law with the text of the Constitution, the historical record, the relevant case law, or even the DOJ Memos on which the President relies most heavily for support. The Court thus finds that the President has not demonstrated a likelihood of success on the merits and is accordingly not entitled to injunctive relief in this action. Contrary to the President's claims, the Court's conclusion today does not "upend our constitutional design." (Pl.'s Reply at 4.) Rather, the Court's decision upholds it.

d. Alternatives

The questions and concerns the DOJ Memos present, and that the President here embraces, need not inexorably lead to only one course, that of prescribing an absolute immunity rule. In fact, the Supreme Court has provided guidance to govern invocations of absolute immunity. In Clinton it declared that such claims should be resolved by a "functional" approach. Specifically, the Court counseled that "an official's absolute immunity should extend only to acts in performance of particular functions of his office." Clinton, 520 U.S. at 694. The court further explained that "immunities are grounded in 'the nature of the function to be performed, not the identity of the actor who performed it.'" Id. at 695

(quoting Forrester v. White, 484 U.S. 219, 229-30 (1988)). Underscoring this point, the Court concluded that "we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." Clinton, 520 U.S. at 694.

The DOJ Memos, while espousing a categorical presidential immunity rule, and perhaps seeming inconsistent on this point as well,[17] also recognize the applicability of such a method. The Dixon Memo, for instance, concludes that

> under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and function of the Presidency.

Dixon Memo at 24.

In the few instances in which the Supreme Court has addressed questions concerning the scope of the President's assertion of executive privilege and immunity from judicial process, albeit in varying contexts, several general principles and a functional framework emerge from the Court's

[17] The Dixon Memo, for example, though remarking that an alternative of permitting an indictment of a President and deferring trial until he is out of office is a course worthy of consideration, rejects the option in favor of a categorical rule. The Dixon Memo also admits to "certain drawbacks" of an absolute immunity doctrine. Similarly, the memo acknowledges the difficulties that a categorical rule presents because of issues such as the running of the statute of limitations and the involvement of co-conspirators, but again discounts those concerns to support a categorical rule. See Dixon Memo at 17, 32.

pronouncements that should inform and guide adjudications of such claims. A synthesis of Burr, Nixon, Fitzgerald, and Clinton suggests that the Supreme Court would reject an interpretation and application of presidential powers and functions that would "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Nixon, 418 U.S. at 706. Rather than enunciating such a categorical rule, the Supreme Court's guidance suggests that courts take account of various circumstances that may bear upon a court's ultimate determination concerning the appropriateness of a claim of presidential immunity from judicial process relating to a criminal proceeding.

Among the relevant considerations are: whether the events at issue involve conduct taken by the President in an a private or official capacity; whether the conduct at issue involved acts of the President, or of third parties, or both; whether the conduct of the President occurred while the President was in office, or before his tenure; whether the acts in dispute related to functions of the President's office; whether a subpoena for production of records was issued against the President directly or to a third person; whether the judicial process at issue involves federal or state judicial process; whether the proceedings pertain to a

civil or criminal offense; whether the enforcement of the particular criminal process concerned would impose burdens and interferences on the President's ability to execute his constitutional duties and assigned functions; and whether the effect of the President's asserting immunity under the circumstances would be to place the President, or other persons, above the law.

The analytic framework the Supreme Court counsels courts to employ requires a balancing of interests. The assessment would consider the interest of the President in protecting his office from undue burdens and interferences that could impair his ability to perform his official duties, and the interests of law enforcement officers and the judiciary in protecting and promoting the fair, full, and effective administration of justice.

The relevance of these multiple considerations in a determination of the appropriateness of presidential immunity from criminal process under such varying circumstances underscores the incompatibility of an unqualified, absolute doctrine, and, rather than a blanket application; points to a case-by-case approach in which a demonstration of

sufficiently compelling conditions to justify presidential exemption is made by the courts.[18]

Here, the Court's weighing of the competing interests persuades it to reject the President's request for injunctive relief. The interest the President asserts in maintaining the confidentiality of certain personal financial and tax records that largely relate to a time before he assumed office, and that may involve unlawful conduct by third persons and possibly the President, is far outweighed by the interests of state law enforcement officers and the federal courts in ensuring the full, fair, and effective administration of justice.

The Court is not persuaded that the burdens and interferences the President describes in this case would substantially impair the President's ability to perform his constitutional duties. See Clinton, 520 U.S. at 705 ("The burden on the President's time and energy that is a mere byproduct of [judicial] review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions."). In

[18] The Moss Memo mentions such a course in passing, reiterating its support for a categorical rule "rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.") Moss Memo at 254. This point ignores that it was precisely this kind of assessment that the Supreme Court conducted in Nixon and Clinton, and that more generally courts routinely make in the course of performing their constitutional duties.

the Court's view, frustration of the state criminal investigation under the facts presented here presents much greater concerns that overcome the President's grounds for not complying with the grand jury subpoena.

iii. The Public Interest

Given that the Court finds that the President would not suffer irreparable harm or succeed on the merits, it is unnecessary to consider whether the public interest would favor a preliminary injunction. Nevertheless, the Court notes that the public interest does not favor granting a preliminary injunction. As discussed above, grand juries are an essential component of our legal system and the public has an interest in their unimpeded operation. Manypenny, 451 U.S. at 243; see also United States v. Dionisio, 410 U.S. 1, 17 (1973) (referring to "the public's interest in the fair and expeditious administration of the criminal laws"); Branzburg v. Hayes, 408 U.S. 665, 688-90 (1972) (in a First Amendment case, referring to "the public interest in law enforcement and in ensuring effective grand jury proceedings" and noting that the principle that the public is entitled to every person's evidence "is particularly applicable to grand jury proceedings"); In re Sealed Case, 794 F.2d 749, 751 n.3 (D.C. Cir. 1986) (per curiam) (referring to "the weighty public

interest in the orderly functioning of grand juries and the judicial process").

III. ORDER

For the reasons described above, it is hereby

ORDERED that the amended complaint of plaintiff Donald J. Trump (Dkt. No. 27) is **DISMISSED** pursuant to the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37 (1971).

SO ORDERED.

Dated: New York, New York
7 October 2019

Victor Marrero
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DONALD J. TRUMP ,

Plaintiff,

v. 19 CV 8694 (VM)

CYRUS R. VANCE, ET AL.,

Defendants.

----------x

New York, N.Y.
September 25, 2019
9:30 a.m.

Before:

HON. VICTOR MARRERO

District Judge

APPEARANCES

CONSOVOY MCCARTHY
BY: WILLIAM CONSOVOY
CAMERON NORRIS
-and-
MUKASEY FRENCHMAN & SKLAROFF
BY: MARC LEE MUKASEY
-and-
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MICHAEL MULLMAN

THE COURT: Good morning. Thank you. Be seated.

This is a proceeding in the matter of Trump v. Vance, et al. It's docket no. 19 CV 8694.

Counsel please enter your appearances for the record.

MR. CONSOVOY: Good morning, your Honor. William Consovoy on behalf of the president. With me this morning from my law firm is Cameron Norris.

MR. MUKASEY: Good morning, your Honor. Marc Mukasey from Mukasey Frenchman & Sklaroff also for the president.

MR. FUTERFAS: Good morning, your Honor. Alan Futerfas for the president as well. Thank you.

MR. DUNNE: Judge, Carey Dunne from the Office of the New York County District Attorney.

MR. SHINEROCK: Good morning, your Honor. Solomon Shinerock on behalf of the Office of the District Attorney.

MR. VICKEY: Good morning, your Honor. Alan Vickey on behalf of the district attorney's office.

MR. GRAHAM: Good morning, your honor. James Graham on behalf of the district attorney's office.

MR. CONROY: Good morning. Christopher Conroy on behalf of the district attorney's office.

MR. BERNSTEIN: Good morning, your Honor. Jerry Bernstein from Blank Rome LLP for Mazars USA LLP.

MS. GARRITY: Good morning, your Honor. Inbal Garrity on behalf of Mazars USA LLP.

MR. TAMBONE: Good morning, your Honor. Nick Tambone from Blank Rome for defendant.

MR. MULLMAN: Michael Mullman on behalf of Mazars LLP.

THE COURT: Let me note that the Court received a filing in this matter submitted last night on behalf of the United States Attorney for this district and it is labeled Statement of the United States in Support of Temporary Restraining Order to Allow Time for the United States to Consider Whether to Participate in this Proceeding.

This proceeding was initiated by submission from the plaintiff seeking a restraining order to enjoin the enforcement of a subpoena that was initiated and served by the district attorney for the County of New York against one of the defendants Mazars USA LLP.

Let me first ask whether the district attorney has received a copy of the statement from the U.S. Attorney regarding this matter and whether they may have a view as to the appropriateness of the request from the U.S. Attorney.

MR. SHINEROCK: Thank you, your Honor.

May I be heard on that discrete now if that's what you wish?

THE COURT: Yes.

MR. SHINEROCK: We did receive the statement. We were surprised to receive the statement last night. The statement in effect requests additional delay of three weeks for

resolution of this matter. And while we recognize that the U.S. Attorney's Office may wish to be heard here, we question whether they should be heard to arrive at the eleventh hour and request such a delay when the parties have, by agreement, labored, as the Court has I'm sure, to prepare the emergency relief motion for adjudication today. That said, the statement does not change our position that compliance should begin under the auspices of grand jury secrecy. No irreparable harm will be done and for that matter while the U.S. Attorney's Office may seek to be heard on the larger issues presented by the lawsuit we don't feel that it's an appropriate impediment to enforcement of the grand jury subpoena at this time.

THE COURT: Thank you.

We will take the observation of the district attorney into account and perhaps return to it later.

Let us begin this proceeding by addressing questions of housekeeping or procedural ground rules for the conduct of the hearing. Thereafter we'll turn to substantive issues presented by the moving papers and the arguments on the record this morning.

First, let's go over questions of time limits. I believe that about 20 minutes for each side in the first instance will be enough. If you were in the Court of Appeals Second Circuit you would probably be lucky to get fifteen minutes.

Before explaining the approach that I plan to take to follow the management of the allocation of the time that I have allotted, I will exercise the privilege and prerogative of the bench to vent one of my pet peeves with a different practice that is common among appellate judges, the United States Supreme Court perhaps the worst offender in this regard. I am certain that this is a practice that most litigators deplore. Taking a small measure of judicial license, I will give you a fictional illustration of the problem.

Attorneys are scheduled for oral argument on a complex legal question of grave consequences to the client, the lawyers and to the public, and the matter at hand is one that could potentially shape the pillars of the republic. For this purpose each the lawyers involved spends weeks or even months preparing, refining, and rehearsing the presentation to the court. When they have the matter down pat, the argument is then compressed to the second precisely within the 20-minute timeframe that the court has given each side. Then the presentation begins. Before the speaker finishes the first sentence, a judge interrupts with a question. Then another judge jumps in now with a question, and then another, any one of which may be entirely on a different issue. The net effect is to throw off course not only the attorney's timing but the sequence, flow, and stride of their argument which in some cases counsel can never recover because by the time the judge's

questioning is over and the speaker can return to where the argument left off the presiding judge reminds the attorney that they have two minutes left to wrap up.

Accordingly, to make the amount of time that I have specified for argument meaningful, I will do two things. First, my general practice is to allow the parties to speak without interruption for questions during at least the first seven minutes of their arguments. Second, coming back to the purpose of this proceeding so as to focus the hearing on the relevant questions and prevent rehashing of matters that you already laid out in your papers as well as to minimize court intrusion into your argument, I will highlight some threshold issues which your presentation should concentrate on because I regard them as potentially dispositive initial matters and because some of them implicate jurisdictional questions.

First, this case entails a subpoena issued by a state grand jury and panel in connection with an investigation conducted by a New York County prosecutor. I note that the tax records and perhaps other financial documents that are the subject of the district attorney's subpoena relate to years going back to 2011. That, of course, encompasses a period long before this president assumed office. In this connection, several questions arise.

Do the tax returns and records covered by the district attorney's investigation pertain to actions and transactions

involving only the president or third persons and businesses related to the president or to a combination of both acting in concert?

Do the matters under the district attorney's investigation relate to potential misconduct that arises only under state law or only under federal law or under both state and federal law?

To the extent any actions involving the president may be involved, do they relate to his official acts or to private conduct of the president as an ordinary citizen?

To what extent are the matters at issue subject to statutory limitations that may soon expire as to the president or as to third parties?

What is the constitutional or statutory source for the relief sought and for this court to exercise jurisdiction to hear the underlying dispute.

Is 42 U.S.C. Section 1983, as the president now claims in an amended complaint, a proper vehicle for the adjudication of this case in federal court as a declaration of rights, privileges and immunity secured by the Constitution or is there any relief that, if warranted, could not be accorded to the president in a state court?

Second, another set of issues implicates principles of federalism and comity. The president is asking a federal court to enjoin proceedings undertaken under authority of state law

enforcement officers before institution of a state's administration of justice. Would the court granting the injunctive relief requested violate the fundamental document embodied in Younger v. Harris and the Anti Injunction Act counseling against federal interference with ongoing state legal prosecutions, civil enforcement proceedings or judicial functions that involve important state interests.

Next, assuming the Court exercises jurisdiction to consider the president's request for injunctive relief restraining the enforcement of a grand jury subpoena, has the plaintiff's application adequately satisfied the requisite showing of irreparable harm and a likelihood of success on the merits?

Regarding the first prong, the Court notes that the subpoena issued by the grand jury is directed not at the president but at a third party and that any documents produced in compliance would be part of a confidential investigation protected from public disclosure by the rule of grand jury secrecy as the district attorney argues. What is the real and immediate threat of actual harm under these circumstances?

Regarding the likelihood of success on the merits, the president's request rests on an implication of an absolute immunity from indictment, prosecution, trial, or other application of criminal process that, as claimed, would extend not only to the president but to his private financial affairs

as well as those of his businesses and corresponding associates. Is there basis in the constitutional text, history or judicial interpretation supporting such a proposition?

If the president why entitled to immunity from criminal process, would that apply to responding to the request for information during a criminal investigation involving not only himself but third parties?

The president argues that the Department of Justice and legal commentators agree that the president cannot be subject to criminal process. What is the definition of criminal process? Does it entail investigation, indictment, prosecution, trial, imprisonment, or any one or combination of these?

The president relies on a legal memorandum issued by the Office of Legal Counsel in October of 2000. That memo itself says that a grand jury could continue to gather evidence throughout the period of immunity even passing the task to a subsequent grand juries.

Next, there is a question as to whether the president can be subpoenaed and/or directed to respond to a subpoena. In this regard, there is precedent from the United States Supreme Court and appellate courts. In United States v. Nixon the Court rejected a claim by the president of absolute privilege based on separation of powers in relation to materials sought related to the president's performance of duties of the

president and involving disclosure of discussions between the president and his aids. The district attorney here in turn has called to our attention conflicted historical evidence. In this regard, the historical record I believe is mixed at best and perhaps you could get into some specifics later on that point.

Let me conclude with another reference to a memorandum issued by the Office of Legal Counsel on which the president's presentation substantially relies. That memorandum states, "Thus, it appears that under our Constitution's plan it cannot be said either that the courts have the same jurisdiction over the president as if he were an ordinary citizen or that the president is absolutely immune from the jurisdiction of the courts in regards to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the presidency."

With that as background let us then turn to the presentations. This matter having been initiated by the president, you have the floor.

MR. CONSOVOY: Thank you, your Honor.

Good morning, your Honor. May it please the Court. Thank you for hearing us this morning on this expedited schedule.

If I might begin with a few procedural points and then

I will turn to the Court's questions and answer them as best I can.

From the perspective of the president, we are not here this morning seeking a permanent resolution of this dispute nor are we asking the court to enter a preliminary injunction this morning although that is certainly an option the court, of course, has. What the president is asking for this morning is what Congress has twice agreed to and what the New York Attorney General has once agreed to in similar cases that are pending now, which is an orderly process that allows the serious constitutional questions to be adjudicated carefully and thoughtfully that preserves the president's right to be heard and allows him a reasonable chance to appeal any adverse decision that might alter the status quo. That is a quite limited relief that will allow what I believe are concededly serious questions to be adjudicated. It affords the U.S. Attorney the opportunity to be heard which has now been sought in a week and eliminates the need for emergency appeals as early as this afternoon to the appellate courts in order to preserve the status quo. If that is what is sought, then I think that limited showing has easily been made by the president's papers.

The Court asked a series of questions about the case, the first set dealing with questions that, in all candor, the president can't answer, which is the nature of the

investigation, what is being sought, and why it's being sought, and what's being pursued. The first paragraph of the declaration submitted was redacted. The president has no access to it. And so we look forward to the answers by my friend from the district attorney's office that would provide more insight into the nature of the inquiry.

What we do know, your Honor, is the subpoena that was sent to Mazars is in all respects a carbon copy of a subpoena that the House Oversight Committee sent to Mazars earlier this year which is now the subject of parallel litigation.

The idea that this office's investigation perfectly replicates an Oversight Committee investigation, plus it just so happens to want one additional thing which are the tax returns that the Ways and Means Committee sought can't be a coincidence. The notion that their investigation or state law perfectly parallels what is claimed to be a federal investigation about federal issues ranging on emoluments to other matters somehow is exactly what this office in good faith needs to pursue a state law investigation is difficult to accept.

But the big question, as your Honor pointed out, is whether the president can make a four-factor test for a temporary restraining order or a preliminary injunction. We think we do.

Your Honor asked about the nature of the

constitutional claim here. We believe it's brought under Article II, under the Supremacy Clause, and under the structure of the Constitution itself, no different than many cases that are brought under the Constitution. The cases -- many cases vindicate separation of powers in this matter. Appointment of clause cases do. Cases like Printz do. Many, many cases. 1983 is an available vehicle. This is a right the president holds and a privilege the president holds under the Constitution, as alleged. And we're simply at the allegation stage of this case. He is alleging that his right to temporary immunity, which is what the Office of Legal Counsel has called it, while he is president, meaning he cannot be subject to criminal process. And I will endeavor to answer your question about what that means as well, your Honor. He cannot be subject to criminal process while in office. That doesn't immunize him permanently. It means that while he is the commander in chief of our nation, 50 states can't decide that they are going to investigate the president while he tries to serve us as a country. That is a job for Congress with impeachment power, if it so chooses to exercise it. That is what the framers of our Constitution said. That is what the text of the Constitution provides. And with all respect for my friends I do not believe it is a close question. The idea that any state, New York or any other, could decide that they would indict a sitting president, there is no support for that while

he is president. The framers said during the debates that once the president was impeached and removed, if that were to occur, then he would be subject to ordinary process. The text of the Constitution says it as well that once removed the courts could have recourse to the president like any other citizen, but not while he is in office.

Once that proposition is accepted, I think there are proliferating consequences from it. And I think the OLC memos from 1973 and including the Bork amicus brief and the Agnew case lay that out exactly.

Your Honor, if you look at that brief that we cite. You're right, your Honor. This is a balancing test. And the Office of Legal Counsel decided the vice-president was not like the president for many reasons and, therefore, would not be entitled to this type of immunity. And one of the reasons that brief gave, your Honor, was that the consequences would be somewhat large because it might impede a grand jury investigation. There would be no point to saying that and saying it differently about the president if that weren't how the Office of Legal Counsel understood the Constitution to function.

Even in Clinton v. Jones the Court Supreme Court drew two important distinctions. One, the Court said do not assume that allowing a challenge of unofficial act in state court would be permitted. That's an open question. And two, we are

not here deciding today whether the president could be made to appear in any particular place at any particular time or be held in contempt.

But, your Honor, if you accept the proposition of the district attorney's office, this is not just about a subpoena for documents. Those same powers could command the president to appear at a particular place, at a particular time, could hold him in contempt, two propositions that I think no Supreme Court decision supports.

Your Honor asked about United States v. Nixon. United States v. Nixon was about a general confidentiality privilege in regard to a third-party subpoena. It was not a criminal process directed at the president. In fact, the Supreme Court, in I believe footnote two or footnote three of that opinion, went out of its way to note that the issues that are more squarely presented here would not be decided there and dismissed the crosspetition as improvidently granted. So I do not believe U.S. v. Nixon supports the district attorney's position. I think the Court's decision to avoid that question more squarely supports the president's.

And I'm happy to return to the merits issues, your Honor, as we proceed but I think it's important to remember that the only question for the Court is whether this is a serious question, whether the ability of the State of New York to subpoena the president's documents from his custodian

exceeds their power under the Constitution is a serious issue. They had every opportunity to say it wasn't. The argument that it's been mixed is just another way of saying it's serious. And so then the question becomes who do the equitable factors favor in this action.

Your Honor noted that there is grand jury secrecy. But that's a matter of state law, your Honor. We do not know how the district attorney will respond to a subpoena from Congress. Would those secrecy laws trump that subpoena? Would they supersede it? Would they not comply with that subpoena? Is the New York legislature committing to not amending its laws to change those rules? Because the president has experienced from the New York legislature amendment of state law designed specifically to target him.

I do not think the district attorney's office can make either promise. And so the president, even on confidentiality, is in some jeopardy.

But I think there's a broader point, your Honor, which is any time the subject of an investigation is told to turn over their documents to the government and they are forced to do so the status quo is forever altered.

THE COURT: Seven minutes of immunity from questions are up.

MR. CONSOVOY: I appreciate the temporary immunity, your Honor.

THE COURT: So let me ask first. You made reference to Clinton, the Clinton case and you quoted what you thought was an appropriate reference to by the Court. In that case the Court looked at the history of the constitutional convention, summarized what it drew to be important points from it and then stated far from being above the laws the president is amenable to them in his private character as a citizen. The quote further said, "This description is consistent with both the doctrine of president immunity as set forth in Fitzgerald..." that's one of the Nixon cases "...and rejection of that immunity as claimed in this case." And you may recall that in that case the president also invoked a blanket absolute presidential immunity even from conduct that preceded the presidency. The Court then concluded, as you know, by stating that the president is otherwise subject to the laws for his purely private acts.

Now, I began by asking or noting that the documents that the district attorney is seeking in this case relate back to 2011 and encompasses a number of years in between and encompasses potentially other individuals. To the extent that those documents going back to 2011 and then up to 2016 relate to purely private acts, private transactions of the president, to what extent is that not covered by the Clinton case?

MR. CONSOVOY: I think it is not covered. I think, your Honor, because in the Clinton case the Court said it is

dealing with a civil action, not a criminal action.

THE COURT: We don't know. In this case the district attorney has not said that what he is seeking as it relates to the president is a criminal investigation or maybe just documents that may relate to a criminal investigation of third parties. That's not clear on this record.

MR. CONSOVOY: That is true, your Honor. Two points. One, if this is not a criminal investigation I'd be interested to hear that.

THE COURT: I said criminal investigation of the president.

MR. CONSOVOY: That was my second point.

THE COURT: As opposed to third parties.

MR. CONSOVOY: The issue here is who the process is directed at. So -- and we stated in our papers -- let me answer it two ways. We stated in our papers that we believe the president is a target of this investigation; that he is at least partly the subject of it. There was nothing in the responsive papers that disclaim that understanding. If it is going to be fully disclaimed today that the president or his businesses are not targets, if they are true third parties, then that may create different questions.

THE COURT: Let me interrupt. Sorry. You mentioned the president or his businesses. What do the businesses have to do with presidential immunity?

MR. CONSOVOY: The immunity -- well, the point of the immunity is to respect the office of the president. If you look at the original commentary by the framers, the reason why the process was set up the way it was, was because when you have a single commander in chief who deals with the world on behalf of the nation it is important that, for foreign affairs and domestic, that he be seen as having the full support of the nation. If there is going to be a problem, Congress through impeachment will address that problem for the nation. If by attacking the president's businesses, by going after the president through his businesses you implicate all of the same interests that the framers were concerned about when they drafted the Constitution the way they did.

THE COURT: Are you suggesting that the businesses could not as individual entities also engage in misconduct including criminal conduct?

Let us suppose for a moment that one of the businesses did not file taxes or falsified documents in the filing of taxes, are you saying that that business, because it's part of the president's financial matters are not subject to prosecution for criminal conduct that occurred before the president was president?

MR. CONSOVOY: No. As you said earlier, this a balancing question. And I think both the Supreme Court through the two Nixon cases, in Clinton v. Jones, and in the Office of

Legal Counsel memo has made clear -- and in the Bork memo too, brief too, that the Court has to take each of these cases as it finds them and try to balance between these two pillars. And I think what the Court would have to assure itself of is that those actions by those businesses are not a means to target the president and would not implicate the president in any finding against those corporations. That is why in the Nixon opinion the Court went out of its way in the footnote to say it was different about the unindicted coconspirator aspect of that case and the truly third-party aspect of the disclosure of the recordings to the grand jury. The Court saw those as two -- even though the president was an unindicted coconspirator, that same question could have been posed there. Well not indicted, these are just about third parties. The Court saw that as different. Didn't decide it. Completely agree. But it saw it as distinct.

And that raises the case here, which is if in a case if the district attorney could show that it is targeting a business that the president happens to own but in no way seeking to target the president through that action would implicate him in the wrongdoing, that might be a different case. But there has been no such assertion here, certainly not in the papers that we've seen. And so we do think the interests are squarely implicated. It is a -- your Honor, and I would concede. There is some breadth to that argument. I

readily concede that.

THE COURT: It's a chicken-and-egg situation. How would the district attorney know that the businesses of the president may have engaged in criminal conduct unless it investigates. But you're saying that they cannot investigate because it may spillover into the president.

MR. CONSOVOY: It's true.

THE COURT: In the meantime, let's pose the other issue. What happens if it's a statute of limitations about to expire? Does that mean that the business in effect gets off scot-free? Riding on the president's coattails?

MR. CONSOVOY: So if I could take those two separately.

On the chicken or egg thing, somebody has to bear the burden. When you have structural constitutional principles, inevitably there will be close cases where one party has to bear the burden of proof. In this situation where we're dealing with Article II of the Constitution, which is unique from all branches, when you're dealing with an office that is unique among all offices and you have a supremacy clause, the district attorney would have to bear the burden of convincing the court that this could in no way implicate the president. That was the point that the Bork memo made in the Agnew case. That was why the Office of Legal Counsel drew the circle in pen only around the presidency, not around the vice-presidency, not

around the judiciary, and not around other civil officers because the office understood that there could be some broader implications about those -- the ability to go after people either related to the president or involved with the president and that is the cost of having a unitary executive. That is the choice the framers of our Constitution made.

Secondly, on statute of limitations, your Honor, as the Office of Legal Counsel noted, it's an open question. New York legislature can solve the problem itself by extending limitations periods. It's possible that we could agree to tolling in order to litigate these issues and resolve this.

THE COURT: Would that raise any possible ex-post questions?

MR. CONSOVOY: Well I think how they do it matters of course. You have to -- they would have to generally extend the limitations period.

But my point is that the legislature is not without redress. What the Office of Legal Counsel said -- and I think the Court would have to reject the opinion to conclude otherwise -- which is even if that's true, even if limitations periods will expire, even if people who are affiliated with the president, it is more difficult to prosecute them, the cost to the nation of allowing this to occur outweigh the rights of the states in this narrow setting.

Your Honor, I think if we're going to address this

practically, whatever the Court rules, if the Court rules that the district attorney can do this, then all 50 states can do this for any of unofficial action the president took before the presidency, during the presidency. That is untenable. The notion that 50 states could decide together we don't like this president or we're going to assert our rights and do that is inappropriate under our Constitution.

THE COURT: In reality our country has been in existence since 1789. How frequently has it happened that 50 states have conspired to somehow undermine the presidency? How likely is it that that might -- scenario might occur?

MR. CONSOVOY: I actually think -- it not happening I think actually supports us, your Honor, in that I don't think anybody even considered this possibility. I think it is so well settled the idea that a state could indict and then charge, arrest, detain a sitting president is so beyond the pale constitutionally that before today I'm not sure a state would have considered it. If your Honor endorses what the district attorney has done here, I do not think it's unrealistic to think that future presidents may experience a far wider range of challenges by states than our country has ever experienced before.

THE COURT: Let's take the case of Vice-President Burr. Would it have been envisioned in 1789 that a state would indict a vice-president?

MR. CONSOVOY: I think -- actually yes. When you look at the history of the convention, and the Bork memo actually walks through this, all of the discussions around protection were about the presidency.

Now, obviously, Burr shooting Hamilton was unexpected in and of itself. And the case in Burr -- actually, your Honor, I was looking at this last night -- was actually interesting because I think it has been misdescribed. There were two state prosecutions with Burr. And then there was the treason charge brought by Jefferson. The subpoena issued there was in response, if you look at the Bybee memo that we cite the article -- the subpoena there was issued by Burr for exculpatory evidence. And what Chief Justice Marshall held was that having initiated the treason charge effectively the presidency had waived the right to object to a subpoena in that case. That is, of course, far afield from here.

So to answer your question directly I think it was -- yes, it was contemplated that a vice-president could be prosecuted. There is no contemplation about the presidency though. Because the country can persist without a vice-president. A president subject to proceedings in a state court, the distraction that would create, the multitude of problems that could arise are unique and different in both degree and kind from anything that would attend to a proceeding against the vice-president.

Your Honor, on the irreparability issue, again, that argument, that secrecy defeats irreparability would then therefore apply to any citizen who is subject to a subpoena if they wanted to assert their Fourth Amendment rights, their Fifth Amendment rights or any other right. The idea that they have nothing to worry about because, don't worry, it's only going to be shown to the district attorney and the grand jury so why should you care about whether it's disclosed I think is an unfortunate way to think about constitutional rights vis-a-vis the exercise of government power and an unfair way to think about it. Again, those laws could be changed. That secrecy is not guaranteed. And the status quo would be forever altered.

Moreover, the president has a confidentiality right to his accounts. Once this disclosure is made that confidentiality right is forever lost. And we've cited pages of cases supporting the proposition that breach of confidentiality can never be repaired later.

In contrast, the only issue on exigency that the district attorney raises is the statute of limitations question that we don't know, we can't even test because we haven't seen the aspects of the declaration that talk about what is being investigated, what those limitation periods might be and whether they can be tolled.

THE COURT: Let me give you another minute to wrap up.

MR. CONSOVOY: Yes. What I didn't touch on was Younger and Anti Injunction Act, so if I could just briefly do that, your Honor. Anti Injunction Act is quite simple. One, it's strictly inapplicable to 1983 claims. We have stated a 1983 claim. We are still at the motion-to-dismiss stage. Mitchum is clear law on that, which is why we do not see the Anti Injunction Act raised very frequently anymore in litigation because so many cases are 1983 cases. It's also inapplicable because this is a case brought by the national government through the presidency and the act is inapplicable there. Younger is definitely inapplicable here, your Honor. We've cited four reasons. I don't think any of them can be refuted.

The Third Circuit has persuasively explained why this is not an ongoing state court proceeding. What the district attorney wants the president to do is initiate a new proceeding and a motion to quash in state court. The Supreme Court has said there is no duty, especially under 1983, to exhaust by initiating a new action in state court. Even if that were not true, there is no obvious vehicle for the president to vindicate his rights as a third party in state court. We found case law suggesting it might not be available. We have seen no authority from the district attorney suggesting otherwise. And, moreover, this is not the kind of case that belongs in state court. This is a federal constitutional action brought

by the president.

The Ninth Circuit has explained, for example, in double jeopardy. The whole point of double jeopardy is not to have to go through the state system twice. And so Younger was held inapplicable to that kind of Sixth Amendment argument for the same reasons that temporary immunity -- that's the Office of Legal Counsel's phrase, temporary immunity -- should not be litigated in state court. This a question for federal court.

THE COURT: Thank you.

You've on numerous occasions made reference to the debates and the constitutional convention and the constitutional history about the powers of a president and immunities. I'm sure that the district attorney will also invoke history and the founders and the framers and commentators. Let me on that point address a point to both sides that in the Youngstown Steel case Justice Jackson described that when confronted with the issue concerning the dimensions of the president's powers said, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century-and-a-half of partisan debate and scholarly speculation yields no end results but only supplies more or less apt quotations from respective sources on each side. They largely cancel each other out."

All right. Thank you. I will now call upon the district attorney's representative.

MR. SHINEROCK: Thank you, Judge.

Again, my name is Solomon Shinerock. I'm an assistant district attorney representing defendant Cy Vance in this matter. I'm joined at counsel table by the District Attorney's general counsel, Carey Dunne, who may also seek leave to address the Court this morning.

Before I begin I'd like to just take a moment to walk through in a procedural way some of the various requests now pending before the Court. I earlier addressed the Court regarding last night's request from the DOJ and the U.S. Attorney's Office, and I say something similar with respect to the request for some sort of stay which was made in the plaintiff's filing of last night. Having agreed to a briefing schedule which would speed this matter up for adjudication today, we find it strange that they now assume the Court needs more time to decide the emergency relief motion. In our view, that is a tacit recognition that they have failed to satisfy their burden under that standard and are nonetheless seeking to effect an end run around that failure by somehow pulling out at random regardless to the question of this stay. For that reason we believe a request for a continued stay should be rejected.

The reason for our urgency, Judge, rests on really two

concerns. First, there is the sitting grand jury which is impeded in the discharge of its duties by the delay occasioned by this litigation raising questions regarding, as your Honor referenced, statutes of limitation as well as the degradation of available evidence.

But perhaps more fundamentally our very presence here in an official capacity, as much as we're glad to be in front of your Honor, our very presence here offends the principles of comity underlining our federalism and Younger abstention doctrine. For that reason we believe this matter should be adjudicated, if at all, in the state court. And that leads us -- that leads me now to our motion to dismiss should the Court choose to accept that motion, we believe it should be set for expedited briefing so that this matter can be fully and quickly resolved for the reasons I just gave.

Before I get to the substance of our argument on the matter before the Court today I would just like to try to address some of the Court's questions related to the subpoena itself and the investigation to the extent that I can do that without revealing grand jury's materials, which I believe I can. The subpoena is public and obviously making it public is the right of the recipient, Mazars, and the plaintiff here. So what I will say in response to your question is that it certainly calls for documents that pertain both to the president but also to a broad range of third party entities and

individuals. Those documents certainly pertain to potential issues under state law. They may also relate to issues under federal law or federal criminal law. That's not our focus. Our exclusive focus is on the state criminal law in this investigation.

With respect to your question on the statute of limitations, all I will say is that as with all criminal charges there are statute of limitations issues and certainly those are implicated by the type of delay that this litigation threatens.

With respect to the contents of the subpoena, I'd like to address counsel's comments regarding similarity to the House Committee's subpoena to Mazars. And what I can say is that I have had no contact with that committee in the context of this investigation or any other. I engaged in a search for publicly available information, identified that subpoena. And unable to very much improve upon it, thought it would be efficient to use it. But there is another reason that was important. When Mazars or any party receives a subpoena of this nature it generates quite a bit of workflow in identifying and gathering the documents collected. The subpoena that had already been served on them hopefully started that process and our view is that we would gain some efficiency in having them work through that process because it also mirrored certainly the scope of what we needed from Mazars. The contention that somehow that

means our investigation is coextensive with the investigation of the House Committee I think is not supported by this issue.

So, I'd now like to turn to the substance of our position on the motion for emergency relief. We have addressed in the brief the questions of the broad presidential immunity that has been claimed by the plaintiff in this case. As tricky as they are, they need not be addressed by the Court to resolve this matter because this Court's decision can and should rest entirely on the principles underlining Younger abstention which we believe disposes entirely of the case.

There is little question that a preindictment grand jury investigation qualifies as an ongoing state criminal prosecution as that term has been used in this Court's abstention analysis. The Third Circuit case that the plaintiffs have referenced is an outlier and has obviously been disagreed with by subsequent cases in the Fourth Circuit, the Eighth Circuit and the Fifth Circuit as recently as 2004, not to mention by decisions of this Court which we cite in the brief, a Judge Lynch decision in 2007 affirming that a grand jury subpoena constitutes a state criminal proceeding for abstention purposes. Judge Wood has a similar decision in 2007 as well.

There is no question that such a proceeding implicates important state interests. And this Court has held on multiple occasions that New York state courts present an adequate forum

for the litigation of any constitutional issues arising from such a state proceeding.

There is no credible claim here to either irreparable harm, harassment, bad faith, or other equitable principle that would defeat the strong policy favoring abstention in cases like this one. We've demonstrated the bona fides of our grand jury investigation which I think is more than we're called on to do. The burden here rests on the plaintiff and their claims of harassment and bad faith are speculative and unfounded in the record.

The subpoena at issue relates to records that are routinely subpoenaed. And the identity of one of the individuals whose records are implicated by the subpoena, namely the president, should not impact the Court's application of otherwise status-neutral laws.

THE COURT: Mr. Shinerock, in relation to your Younger argument, as you undoubtedly know, Younger was either clarified, modified, and some people say narrowed by the Sprint case. To what extent do you believe that Sprint in any way addresses or narrows your argument?

MR. SHINEROCK: Your Honor, we cite the Sprint case in our brief and our view is that while it may have narrowed the reach of Younger in other contexts, in fact, it affirmed that Younger is appropriately applied and federal courts ought to abstain in criminal, state criminal proceedings. And we submit

that this is exactly the type of case which is appropriate for Younger abstention consistent with the Sprint decision. As my colleagues have passed me a passage from the Sprint Communications case, which I think directly addresses your question. It says, "Younger exemplifies one class of cases in which federal court abstention is required. When there is a parallel pending state criminal proceeding federal courts must refrain from enjoining the state prosecution." That's on page 72 of the decision. And as I've said, courts -- judges in this court have found the issuance of a criminal grand jury subpoena to constitute state criminal proceedings for abstention purposes.

The plaintiffs fair no better on the merits of their application for a preliminary injunction. There is no likelihood of success here. As I think your Honor has pointed out and I won't belabor, they have no authority for the breathtaking grant of immunity that they seek.

The Nixon and Sirica cases, as your Honor pointed out, do stand for the proposition that a subpoena may be enforced against a president. Their position, if accepted, would create a nonjusticiable rule opening federal courts to anyone with a state or federal grand jury subpoena to challenge that subpoena on the basis of some claim, association, or affiliation with the president. And I don't think that's a workable rule.

I would point out too that the legitimacy of their

claim to immunity with respect to the Mazars subpoena is belied by their failure to claim the same immunity with respect to the subpoena issued to the Trump Organization itself. They've complied in part with that subpoena, as they have complied in other criminal investigations to date and at a minimum failed to raise these same broad immunity arguments in the context of those investigations and so I think the Court has to question closely why they are raising these claims now in the context of the Mazars subpoena.

The true risk of harm here falls on the state judicial process and on the specific grand jury now impanelled and investigating these matters.

THE COURT: Mr. Shinerock, on that point, the investigation that you've alluded to clearly is very complex, probably has a lot of difficult meanings, involves a lot of parties, extends over many, many years. To what extent is the grand jury sitting on its hands because they don't have the material from this proceeding or is there nothing else that they could do in the meantime while we resolve this issue?

MR. SHINEROCK: Your Honor, I'd request just a brief moment to confer with our general counsel on that question, if you would allow it.

THE COURT: All right.

(Counsel confer)

MR. SHINEROCK: Judge, what we can say is there are

other subpoenas outstanding. There is some work that may be done in the interim. Certainly the absence of the records that are under consideration here present a substantial impediment to their work but what I think I would say is that issue isn't really what's before the Court. Their work is impeded to some degree. The question before the Court really is whether the plaintiff can come, bring a state agency before a federal court and impede in any way an ongoing state criminal proceeding. I think the answer to that is a resounding no.

Now, on the merits of their request for injunctive relief, they fair no better, importantly, because they have failed to establish irreparable harm. As I had suggested, the true harm here falls on the state judicial process. The plaintiff's burden today is to show not merely an unusual factual situation which certainly I concede we have here, but they must show an extraordinarily pressing need for immediate federal equitable relief. And that's directly from a case that we cite in the brief. They failed to meet that burden.

As we have said, our office will keep the documents in confidence. The plaintiff has no basis to suggest otherwise. The claims regarding changes to hundreds of years of grand jury secrecy rules I think are just the type of speculative and non-immediate harm that do not satisfy the standard for emergency relief. Any harm resulting to the president's claimed right to immunity, to the extent such a right exists,

is entirely speculative and unripe at this point as well given the early stages of the grand jury process. Indeed, allowing that process to unfold further may generate an actual judicable controversy for the Court but at this point there simply is no controversy.

As I said before, the plaintiffs bear the burden here. They have failed to carry it. Accordingly, Mazars should be left to the orderly and the confidential production of documents while any constitutional claims are litigated fully and fairly in an appropriate forum.

Judge, if you have for further questions I'd cede the rest of my time.

THE COURT: Thank you.

MR. CONSOVOY: May I be briefly heard, your Honor?

THE COURT: Yes. Mr. Consovoy.

MR. CONSOVOY: I'd like to make just six very brief points, your Honor, and then return to the process at the end, if I might.

One, the district attorney now concedes the president is a target and his records are implicated.

Number two, the district attorney now concedes that the merits are tricky.

Three, the district attorney now concedes there is a circuit split on Younger and all of its contrary authority predates Sprint.

Four, the district attorney concedes that they copied a congressional subpoena and sent it to Mazars even though they now concede their investigation is not coextensive with the federal investigation but they did it as a matter of convenience. That is the very definition of bad faith.

Five, the district attorney has never said this morning that the president has an avenue for relief through a state process. We have cited authority that suggests he does not.

Six, the district attorney never says that they would reject the congressional subpoena if these documents are turned over.

Finally, your Honor, the reason why we have guidance from the Supreme Court in Nixon is because the subpoena was stayed. The reason why we have guidance from the Supreme Court in Eastland is because the subpoena was stayed. The reason why we have guidance from the Supreme Court in Clinton v. Jones is because those proceedings were delayed through the Eighth Circuit on a legal point and the Supreme Court had the opportunity to adjudicate the question.

The issue this morning is whether this serious constitutional issue will remain ripe in the posture it is so that both this Court, the Second Circuit, and potentially the Supreme Court can issue an important decision, as your Honor noted, on a very significant constitutional issue. These are

serious questions and they should be decided in an appropriate fashion.

And as we note in our reply, your Honor, the agreement here runs at 1 p.m. today and the president is in the unfortunate posture of having to decide how to proceed to ensure the status quo is preserved if and when that 1 p.m. deadline expires. So we respectfully request guidance from the Court as to what next steps might look like in light of those factors.

MR. DUNNE: Your Honor, may I?

THE COURT: Yes.

MR. DUNNE: I just want to punctuate one brief point, your Honor. And that is Mr. Consovoy started earlier today by saying that they are looking for quite limited relief which is a stay of the obligation to produce these documents. But what that means, of course, is what they're asking for further today is additional delay. And that really is not just the quite limited relief they are seeking; it is what they want in the end. They otherwise characterize it as some temporary immunity for however long. What that means, if they get further delay basically is that they win and we lose without an adjudication by this court and that's not what should happen today.

Thank you.

THE COURT: How do you see the loss there, Mr. Dunne?

MR. DUNNE: I'll just repeat the points we've made

about irreparable harm, statute of limitations. They are all very real. They are running. As to third parties as well, as the Court has pointed out. And I just don't see the irreparable harm in the face of, again, the grand jury secrecy that applies to us. We just want to do what we do everyday which is to gather documents in confidence and see what they say and whether there should be any action taken as a result. That's the harm to us. We have our own constitutional rights under Younger, etc. that we're trying to vindicate here. We just want to go home and do our grand jury work.

THE COURT: Do you believe that grand jury work would be irreparably impeded if the Court were to wait let's say ten days or so or two weeks that the U.S. Attorney has requested, assuming that they do agree to interject themselves?

MR. DUNNE: Your Honor, it's absolutely -- first, again, as to the request from the Department of Justice Southern District last night, again, they're not before the Court. They have not made any motion before the Court. They have simply issued a statement, so-called, saying we'd like another week to think about this. There is no such thing, your Honor, as a motion to have the government cogitate, especially given the emergency timetable that the parties agreed to last Thursday in your chambers. So I would again suggest it's just inappropriate and unnecessary at this point.

But more importantly, I think it's plain from

everything that the plaintiff has said in its papers and today that the real game plan today, again looking for as much delay as possible, is to seek stays at every stage. No doubt whatever the result of today's proceeding, and whether that result is decided today or a week from today or whenever, the plaintiff is going to appeal. And during that appeal there will be further requests for a stay. They will appeal further if necessary I believe, as they've said, to the Supreme Court and there too they will be seeking a stay. They're envisioning an at least months-long or longer process during which the entirety of the obligations to produce these documents is stayed, getting to a point where no doubt statutes of limitations that we're concerned about will have run and perhaps getting to a point where the president himself is out of office at which point I think they concede we can then proceed but at that point we'll have no charges available. So I think that the stays we're talking about again mean they win, we lose, and I think it's just inappropriate.

MR. CONSOVOY: Just to clarify two things. I want to make sure that the court was aware that, as this court takes it under advisement, the president is prepared to toll the limitations period. So that should take some of the sting out of it.

And second what I just heard the district attorney say is we need to hurry because we may not be able to indict the

president while he's still president if we don't. I don't think it could be any clearer who the target here is.

MR. DUNNE: Your Honor, on both points I think that this has been made clear. But whatever the grand jury is looking at, and I'm not going to be specific about that, of course, it's been made clear there is conduct at issue that has been engaged in by a wide variety of parties and a wide variety of businesses. The offer of tolling for whatever time period they have in mind is very generous but they will not be tolling the statute of limitations as to any of those other third parties, whether they're businesses or individuals, and that doesn't get us anything I'm afraid. And, again, I just don't think that's going to get us what we need and I think that we ought to go home and do our work.

THE COURT: Mr. Dunne, what you've said concerning the likelihood of continuing appeals sounds like a statement of an inevitability of some delay and the question is to what extent should some of that inevitable delay at this stage be short or longer.

Assuming that we were to agree that perhaps a short stay would be appropriate, let's define short as follows. The U.S. Attorney has requested until October 1 to make a determination and until October 15 to make a submission if they decide to make a submission. What if we agree that the U.S. Attorney should have until let's say Monday to decide and until

Wednesday to make whatever submission they're going to make? Would that propose the same concerns or mitigate the concerns that you have?

MR. DUNNE: Again, your Honor, that sounds very reasonable and a very near-term basis but, again, my fear is that this is just going to be extended again and again such that any few days delay will only be followed on inexorably.

THE COURT: I have the ability to say to the plaintiff that whatever judgment I make should be so irrefutable that they should be enjoined from appealing.

MR. DUNNE: Understood, your Honor.

I just want to point out that, as we I think make clear in our papers, we envision a scenario where these important issues can, yes, be adjudicated, if they must, in federal court, although we object to that, of course. But if they are to proceed in federal court on appeal hereinafter, given the need that our grand jury has for these materials and given the fact that they will be maintained confidentially, there is no need to impose a stay of the production during the process in which these issues are adjudicated in federal court if that's what has to happen. Again, that will solve the problem of us not being able to get materials in the course of our investigation in time. But, yes, again the issues can be adjudicated as necessary on appeal. I just don't see that -- the risk of harm is such that the simple production of

confidential materials to a confidential grand jury to be held in secret is going to cause the harm they expect.

With respect to the rather extravagant claim that there is a risk that somehow the New York state legislature will invalidate the principles of grand jury secrecy after two hundred years, I submit that that's not -- that's the kind of fanciful speculation that an irreparable harm argument really shouldn't rely on. I suppose it's also along those lines possible that the State of New York could be annexed by Ukraine who would invalidate the grand jury secrecy.

That's all fanciful, your Honor. It's not a basis to make a judgment. And I think that we should be trusted with these documents during the course of any subsequent appeal of these proceedings.

THE COURT: Let me ask you again. Focusing on the nature of the documents that are involved, is there one single document that is at issue let's say, for example, the president's tax returns or is it a much larger bundle of documents of which the tax returns are one?

MR. DUNNE: It's the latter, your Honor, a much larger bundle is a good way of putting it. As everyone seems to agree, this is a wide range of request for documents of the sort that we pursue quite commonly in our office. Yes, the tax returns are a subset of those documents but there's a whole range of other financial records that we're seeking here for,

again, reasons which I can't get into but they are all in good faith and so I don't think we can narrow it to a single document or single category.

THE COURT: In that case, Mr. Consovoy, why could not the parties work out some arrangement where some of that other bundle of documents to the extent they don't relate directly to the president could be turned over while we adjudicate the question of the tax returns which seem to be the bone of contention here?

MR. CONSOVOY: In candor, your Honor, it's beyond the tax returns. That was sort of the impetus for the dispute. I could walk the Court through it, but it's not really that pertinent anymore.

But we object to the subpoena to the third party and to the broad range of documents.

I think your Honor had it exactly right, which is we are only asking for a short period of time before this court. As your Honor noted, whatever happens after that will be for the Second Circuit, the Supreme Court to decide. They may -- we hope the Court rules in our favor, of course, as every litigant does. But if the Court does not, then the Second Circuit may determine that the stay is inappropriate or the Supreme Court may determine that a stay is inappropriate. All we're asking for is time for the U.S. Attorney to weigh in, time for the Court to issue a decision, and a very short period

of time after that for us to seek further relief from the Court of Appeals. We asked for seven days. It could be three days. I think these requests --

THE COURT: You're not actually answering my question. Whether it's three days or three weeks, assuming that part of the bundle of documents is not really in controversy, why could not you and the district attorney agree upon some program of disclosure that addresses their concerns about the ongoing investigation as to matters that may not necessarily relate to the president's tax returns?

MR. CONSOVOY: Your Honor, I'd have to obviously, as you understand, consult with my client. We attempted to engage in negotiations before we came to this court. We've given over reams of information already that were directly sought from the organization, as we noted in our papers. This is not an issue of noncompliance. This is about an inappropriate subpoena where they photocopied a congressional subpoena and said here you go.

THE COURT: I am raising a question of continuing compliance in part.

MR. CONSOVOY: So we can -- it's impossible for me to negotiate in open court. I imagine it would be a range of documents that would be potentially OK. I've talked to my client. There is a range of documents that, you know, absolutely not. And then there's a middle ground, and I

suspect negotiations between the parties will break down over the middle ground. If the Court would like us to meet with them and discuss this, we are happy to.

THE COURT: Mr. Dunne.

MR. DUNNE: Your Honor, my fear is that that middle ground will expand to incorporate virtually everything except routine correspondence among the various parties at issue here. I mean the fact is that we can't be in a position where the plaintiff's lawyers are the ones looking at the documents in question, deciding which will pertain to their client or don't pertain to their client when, in fact, their position is that the client is everything, every business, every subsidiary, every transaction. They can't be in the position to dictate to us and make the judgments as to what is too close to their client to be produced here. I don't think this is going to be a fruitful negotiation, your Honor.

THE COURT: Well, perhaps it might be more fruitful if it involved not just the two of you but some facilitation by the court where documents could be submitted, as you undoubtedly know from discovery disputes, to a magistrate judge who decides whether or not a document falls in box A or box B.

MR. DUNNE: Obviously, your Honor, we'll comply with whatever process the court wants to set up. I just don't know what governing principles would guide the magistrate in deciding what is, quote, too close to the president to produce

or not in the context of a request for a range of documents about a range of businesses, some of which, not all of which, are actually owned by or presided over by him while he was -- before he was in office and I just don't -- I can't contemplate what that process would look like. And, in fact, we would instead suggest we just go back to the routine process we undertake everyday which is getting materials, keeping them secret, evaluating what they mean, and seeing whether any action ought to be taken as a result. At that point, because this is all very premature, only at that point, if we get to the stage where we think there needs to be presented to the grand jury potential charges against one or more parties or people, perhaps at that point there will be something that becomes more ripe. But right now we're just in the very early stage of wanting to review materials. And this entire process I think is really designed by the plaintiff to make sure that doesn't happen.

THE COURT: Mr. Consovoy.

MR. CONSOVOY: I don't have much to add, your Honor. We offered to meet and negotiate. We met and negotiated. The district attorney does not want to discuss it. We were -- there's not a document Mazars has that we don't have in our possession. Normally you come to the party who has the document and ask them. They did. We complied. We had a narrow dispute over the scope of that subpoena and the response

was we're going to photocopy a federal subpoena, send it to your accountants and see if we can strongarm them to comply before you can get heard in court.

MR. DUNNE: I don't want to get into the backing and forthing that led to this dispute, but suffice it to say that, again, the plaintiff's position, through his lawyers, was the way this ought to work is you should tell us what you're looking at. You should tell us what information you think you need. We'll then go back and look at the documents and see if there's anything that we want to give you that might be responsive or not. And that's not how this process works, your Honor.

THE COURT: It is the reality that when the parties are acting unilaterally they take positions like that but when they are acting under the auspices of a judicial officer there is a referee who can make determinations.

I need not remind you, I'm sure, that in your experience over many, many years you've been on both sides of these kinds of disputes and there are magistrates, and please don't underestimate their ability and experience in making those kinds of judgments. Recently this Court had occasion, I believe it was Judge Wood, who was presented with a question of I believe in the Michael Cohen documents, which should be disclosed, which should not be; which are privileged and which are not. Judge Wood appointed special master in the form of

Judge Jones and the matter was resolved.

MR. DUNNE: Your Honor, I'm aware of that case. And obviously, again, we will comply with whatever process the Court wants to put in place. And anything that in a constructive way helps us get access to the information we need in a timely fashion we would welcome.

THE COURT: All right. Would you then undertake to stay the implementation or enforcement of the subpoena for an additional period of time not to exceed let's say Wednesday of next week and by that time the U.S. Attorney may or may not have submitted whatever they may submit. If they do, I will undertake from that point forward to examine the record and make a judgment on the question of injunctive relief. But in the meantime the parties can retain the status quo for an additional week and also in the meantime if you can agree upon some form of rolling disclosure that enables the investigation to proceed as to matters that don't implicate the president's privilege to the extent that any exists, I think that that might go a long way towards accommodating both interests.

Mr. Dunne.

MR. DUNNE: Your Honor, obviously, we'll comply with whatever the Court orders. But I don't think --

THE COURT: I'm trying not to order it. I'm trying to see if you can agree so that I don't have to order it.

MR. DUNNE: Thank you, your Honor.

With all due respect, I have to retreat to our more important primary position, which is we don't believe that this dispute belongs in federal court in the first place. And, therefore, to agree to a process that keeps us here and which at least tacitly acknowledges that this Court has the jurisdiction and should be entertaining these arguments, I appreciate the effort that to try to negotiate a solution that gets us at least some portion of what we're asking for here, but I'm afraid that we cannot in good conscience, given our own Younger constitutional rights, our office, agree to that as a matter of a concession here. Of course, we'll abide by whatever order the Court directs toward us.

THE COURT: If I made an order, Mr. Dunne, and you disagreed with it, then you're going to be in the position of taking it up on appeal.

MR. DUNNE: That may be -- that may be something we need to consider, your Honor, yes.

In other words, I don't want to seem obstinate but our position is that this production should ensue. And, again, if it needs to ensue while this is still being adjudicated in federal court, we'll abide about that and respond in federal court. But I think we simply cannot agree that the production should be stayed given our Younger concerns and given our very strong view that there's just no good faith basis for the plaintiff to be objecting to it given the lack of harm.

THE COURT: I am inclined to grant the U.S. Attorney's request for a few days to determine whether or not there is some basis for the U.S. Attorney or the Justice Department to make whatever statement they think may be helpful for the resolution of the dispute here. I will grant until Monday of next week for the U.S. Attorney to consider the issue and inform the Court as to whether or not the U.S. Attorney and/or the Justice Department will seek to intervene in some form. If they choose to do so by some submission, I will give a deadline of next Wednesday for that submission to be made. If the submission is sufficient on paper for the Court to decide, I will close the matter at that point from further filings and endeavor to make a decision very soon thereafter. And I assure you that it will not be weeks or months.

Now, given that schedule, I would suggest that the parties go home, sober up, decompress, perhaps get together again between now and tomorrow and see whether some way may be found to accommodate the concerns that have been expressed from both sides.

Now, in the meantime I recognize that there is a deadline of 1 p.m. today by which the subpoena should be enforced. The district attorney has not indicated an inclination to agree voluntarily to a stay of any length and essentially invited the Court to make an order. I will then order the stay of a subpoena for one day to enable you to, as I

said before, go home and think about this and talk to one another and inform the Court by tomorrow whether a further agreement might be in order.

MR. DUNNE: Thank you, your Honor.

MR. CONSOVOY: The only remaining issue, your Honor, is if the Court ultimately does not stay the subpoena through the period where you've given the U.S. Attorney, I just want to reiterate our request for some period of relief after so we can seek recourse in the Court of Appeals.

THE COURT: That's the agenda for tomorrow.

MR. CONSOVOY: Yes. Thank you very much.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,
Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York; SOLOMON SHINEROCK, in his official capacity as Assistant District Attorney for the County of New York;

and

MAZARS USA, LLP,
Defendants.

Case No. 1:19-cv-08694-VM

EMERGENCY NOTICE OF APPEAL

Plaintiff Donald J. Trump hereby appeals to the U.S. Court of Appeals for the Second Circuit, on an emergency basis, this Court's decision from October 7, 2019, denying Plaintiff's emergency motion for a temporary restraining order and a preliminary injunction, denying Plaintiff a stay pending appeal, and dismissing the case.

Dated: October 7, 2019

Respectfully Submitted,

/s/ William S. Consovoy
William S. Consovoy
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Arlington, VA 22209
(703) 243-9423
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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of October, two thousand nineteen.

Before: Raymond J. Lohier, Jr.,
Circuit Judge.

Donald J. Trump,

Plaintiff - Appellant,

v.

Cyrus R. Vance, Jr., in his official capacity as District Attorney of the Country of New York, Mazars USA, LLP,

Defendants - Appellees.

ORDER

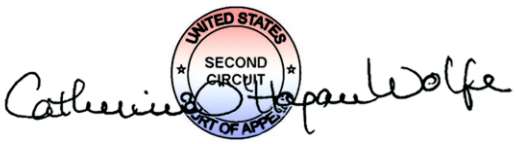
Docket No. 19-3204

Appellant has filed a motion seeking an order temporarily staying enforcement of a subpoena to his accountant. Because of the unique issues raised by this appeal,

IT IS HEREBY ORDERED that a temporary administrative stay is granted pending expedited review by a panel of the Court. A scheduling order will issue in the ordinary course.

For the Court**:**

Catherine O'Hagan Wolfe,
Clerk of Court



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Before: Raymond J. Lohier, Jr.,
Circuit Judge.

Donald J. Trump,

Plaintiff - Appellant,

United States Department of Justice,

Amicus curiae,

v.

Cyrus R. Vance, Jr., in his official capacity as District Attorney of the Country of New York, Mazars USA, LLP,

Defendants - Appellees.

ORDER

Docket No. 19-3204

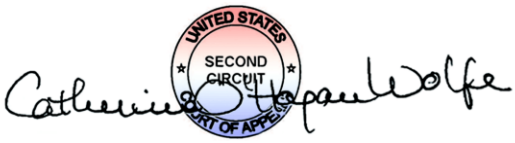
A temporary administrative stay pending expedited review by a panel of the Court issued earlier today. The order further provided that a scheduling order would issue in the ordinary course.

Appellee Cyrus R. Vance moves for expedited consideration of both the motion for a stay pending appeal as well as the merits of the appeal and proposes a briefing schedule with argument to be held on October 11, 2019. Appellee Vance also requests that if the appeal is not submitted to a merits panel on October 11, 2019, the Court hold argument on the motion for a stay pending appeal on that date. Appellant proposes a briefing schedule that contemplates consolidated argument of the stay motion and merits of the appeal after October 18, 2019. The United States Department of Justice, as amicus in support of Appellant, proposes that its brief be due on or before October 11, 2019.

IT IS HEREBY ORDERED that expedited consideration of both the request for a stay pending appeal and the merits of the appeal is granted. Under the circumstances, the motion for a stay pending appeal is too closely linked to the underlying merits to be argued separately. Appellant's brief is due Friday, October 11, 2019 at 5:00 pm. The United States Department of Justice's amicus brief in support of Appellant is due at the same time. Appellees' briefs are due Tuesday, October 15, 2019 at 5:00 pm. Appellant's reply brief is due Thursday, October 17, 2019 at 5:00 pm. Argument will be scheduled as early as the week of October 21, 2019. The temporary administrative stay remains in effect until argument is completed.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



CERTIFICATE OF SERVICE

I filed a true and correct copy of this appendix with the Clerk of this Court via the CM/ECF system, which will notify all counsel of record.

Dated: October 11, 2019

s/ William S. Consovoy
Counsel for President Donald J. Trump